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UNITED STATES
CIRCUIT COURTS OF APPEALS
REPORTS

WITH KEY-NUMBER ANNOTATIONS

WITH TABLE OF CASES IN THE UNITED STATES CIRCUIT COURTS OF APPEALS
WHICH HAVE BEEN PASSED UPON BY THE SUPREME
COURT OF THE UNITED STATES

VOLUME 157

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AMENDMENTS TO RULES

UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT

25.[1]

ORAL ARGUMENTS.

1. The plaintiff in error or appellant in this court shall be entitled to open and conclude the argument of the case. But when there are cross-appeals they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

2. Only two counsel will be heard for each party on the argument of a case.

3. Upon appeals from orders granting or refusing a preliminary injunction or appointing a receiver, and upon appeals in habeas corpus matters and upon appeals and petitions to revise in bankruptcy, one-half hour on each side; upon writs of error three-quarters of an hour on each side, and in other cases one hour on each side will be allowed. No more time than above specified will be allowed without special leave of the court granted before the argument begins. The time thus allowed may be apportioned between the counsel on the same side at their discretion, provided always that a fair opening of the case shall be made by the party having the opening and closing argument.

4. Any case entitled to be heard at any term or session of the court may be submitted by either or both of the parties on briefs. Consent to submit a case on briefs may be filed at any time prior to, or at the time the case is reached for hearing.

Subdivisions 1, 2, and 4 adopted November 1, 1914, and amended June 2, 1916.

Subdivision 3 adopted November 1, 1914, and amended March 8, 1918.

[1] See, also, rules 35 (231 Fed. v, 144 C. C. A. v) and 36 (208 Fed. v, 124 C. C. A. v).

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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS

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(244 Fed. 377)

UNITED STATES ex rel. PALMER v. LAPP, U. S. Marshal.

(Circuit Court of Appeals, Sixth Circuit. June 30, 1917.)

No. 2975.

1. UNITED STATES MARSHALS ⟹3—DEPUTY MARSHALS—APPOINTMENT AND REMOVAL.

Under Act Oct. 22, 1913, c. 32 (38 Stat. 208), providing that any deputy collector of internal revenue or deputy marshal, who may be required by law or by authority or direction of the collector or marshal to execute a bond, may be appointed by the collector or marshal who may require such bond without regard to the Civil Service Act, Jan. 16, 1883, c. 27, 22 Stat. 403, and the amendments thereto, or any rule or regulation made in pursuance thereof, and that the officer requiring such bond shall have power to revoke the appointment of any subordinate officer or employé and appoint his successor, at his discretion, without regard to such acts, amendments, rules, or regulations, the power of appointment may be exercised by the marshal according to his individual discretion, as the grant of a general power to appoint carries with it the right to remove at any time or in any manner deemed best, with or without notice.

2. UNITED STATES MARSHALS ⟹3—DEPUTY MARSHALS—APPOINTMENT AND REMOVAL.

Act Oct. 22, 1913, concerning the appointment and removal of deputy marshals, is in conflict with Act Aug. 24, 1912, c. 389 (37 Stat. 555), under which no person in the classified civil service could be removed except for cause and upon notice and an opportunity to answer the charges, and the act of 1912 must yield so far as the removal of deputy marshals is concerned.

3. MANDAMUS ⟹16(1)—GROUNDS FOR DENIAL—WRIT INEFFECTUAL OR FRUITLESS.

Under Act Oct. 22, 1913, where a United States marshal removed a deputy marshal appointed prior to the enactment of that act, without requiring him to execute a bond, and then revoking his appointment and naming his successor, a writ of mandamus would not be issued to compel the deputy marshal's reinstatement, as it would be fruitless, since it could be avoided by the marshal through mere demand of a bond and notice that the appointment would be revoked upon presentation of the bond.

4. UNITED STATES MARSHALS ⟹3—DEPUTY MARSHALS—APPOINTMENT AND REMOVAL.

It was within the power of Congress to authorize United States marshals to revoke the appointment of deputy marshals at their discretion, as was done by Act Oct. 22, 1913.

5. UNITED STATES MARSHALS ⟹3—DEPUTY MARSHALS—APPOINTMENT AND REMOVAL.

That the Act Oct. 22, 1913, as to the appointment and removal of deputy marshals, was a rider to an appropriation bill, cannot affect its construction.

6. OFFICERS ⟹7—POWER TO REMOVE.

In the absence of constitutional or statutory regulations, the power of appointment carries with it, as an incident, the power to remove, when no definite term is attached to the office by law.

7. OFFICERS ⟹7—POWER TO REMOVE.

When an appointee holds an office at the will and discretion of his superior having the power of appointment, he is subject to removal at pleasure.

8. UNITED STATES ⟹36—REMOVAL OF OFFICERS—REVIEW.

The civil service regulations made by the civil service commissioners and the President, and promulgated by the President, do not have the

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force and effect of law, nor can the courts enforce them as such, or review the action of an appointing officer in removing an employé, though the President may enforce them by removing any person who refuses to abide by them.

9. STATUTES ⟹131—AMENDMENT—NATURE OF AMENDMENT.
An amendment to a statute may be effected by a mere addition thereto, in the absence of a constitutional prohibition, as a law is amended when it is, in whole or in part, permitted to remain, and something is added to or taken from it, or it is in some way changed or altered to make it more complete or perfect, or to fit it the better to accomplish its object or purpose.

10. STATUTES ⟹225½—CONSTRUCTION—GENERAL AND SPECIAL STATUTES.
General legislation must give way to special legislation on the same subject, whether the provisions are found in the same statute or in different statutes, and generally the provisions must be so interpreted as to embrace only cases to which the special provisions are not applicable.

11. CONSTITUTIONAL LAW ⟹70(3)—JUDICIAL FUNCTIONS—WISDOM OF STATUTES.
The courts may not question the wisdom of a statute.

12. UNITED STATES MARSHALS ⟹3—DEPUTY MARSHALS—APPOINTMENT AND REMOVAL.
Under Act Oct. 22, 1913, a deputy marshal could be removed by the marshal without notice or a hearing.

13. MANDAMUS ⟹76—REMOVAL OF OFFICERS—DISCRETION.
As under Act Oct. 22, 1913, a United States marshal may remove a deputy marshal at his discretion, a writ of mandamus will not issue to control such discretion, as in exercising his power to remove the marshal does not act in a judicial capacity.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Ohio; John E. Sater, Judge.

Mandamus by the United States, on relation of Charles H. A. Palmer, against Charles W. Lapp, United States marshal for the Northern district of Ohio. The writ was denied, and relator brings error. Affirmed.

W. L. Flory, of Cleveland, Ohio, for plaintiff in error.

Jos. C. Breitenstein, Asst. U. S. Atty., of Cleveland, Ohio, for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. The United States marshal for the Northern district of Ohio revoked the appointment of his chief office deputy, and the court below refused to issue a writ of mandamus to compel the marshal to reinstate the deputy. The facts on which the mandamus proceeding was based and the reasons for denying the writ appear in the trial judge's opinion, hereafter set out. In our judgment the writ was rightly denied, and, subject to some explanation, we approve of the reasoning on which refusal of the writ was based. It is true that at the time the relator, Palmer, received his last appointment as chief office deputy, August 4, 1913, he belonged to the classified civil service; and that according to section 6 of the act of August 24, 1912, c. 389, 37 Stat. 555 (Comp. St. 1916, § 3287), "no person in the classified civil service" could be removed except for such cause

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as would "promote the efficiency of said service, and for reasons given in writing" and upon notice, service of a copy of any charges preferred, and allowance of a reasonable time to answer the charges in writing. It is to be observed of this provision that in terms it applies generally to all persons engaged in the classified civil service; and admittedly the legal removal of relator could have been effected only through observance of the mode prescribed by that act if no other legislation had intervened. However, on October 22, 1913, an act was passed in which it was provided, in paragraph entitled "Civil Service Commission" (38 Stat. pt. 1, p. 208):

"That hereafter any deputy collector of internal revenue or deputy marshal who may be required by law or by authority or direction of the collector of internal revenue or the United States marshal to execute a bond to the collector of internal revenue or United States marshal to secure faithful performance of official duty, may be appointed by the said collector or marshal, who may require such bond without regard to the provisions of an Act of Congress entitled 'An act to regulate and improve the civil service of the United States,' approved January sixteenth, eighteen hundred and eighty-three, and amendments thereto, or any rule or regulation made in pursuance thereof, and the officer requiring said bond shall have power to revoke the appointment of any subordinate officer or employé and appoint his successor at his discretion without regard to the act, amendments, rules, or regulations aforesaid."

[1] It will be noticed that this provision is special in its terms and application; it relates distinctly and only to deputy collectors and deputy marshals and their principals, respectively; and the right to revoke appointments of either of these classes of deputies and to appoint successors is discretionary in the several collectors and marshals; that is, such power of revocation and appointment may be exercised by those officials according to their individual discretion, since "the grant of a general power to remove carries with it the right to remove at any time or in any manner deemed best, with or without notice." Eckloff v. District of Columbia, 135 U. S. 240, 241, 10 Sup. Ct. 752, 34 L. Ed. 120.

[2] Judge Sater was undoubtedly right in applying the established rule that, where there is any conflict between a general statutory provision and a special one upon the same subject, the former must yield to the latter regardless of the fact that the two provisions are found in different enactments. It is to be presumed, for example, that by the special act here involved Congress intended to create an exception as respects the appointment and removal of these two classes of deputies. That there is conflict between the two enactments, the one of 1912 and the other of 1913, concerning deputy collectors and deputy marshals who belong to the classified civil service, seems clear enough. The act of 1912, as we have seen, is comprehensive in its application to all persons "in the classified civil service," and it forbids their removal except in accordance with the formal mode there prescribed; while the act of 1913 authorizes summary removal and appointment of the two classes of deputies mentioned, one of which, through express official designation, includes relator. This conflict is accentuated by the fact that the removing officer is invested with power to appoint a successor regardless of the Civil Service Act of January 16, 1883. True, the scheme of this last-mentioned act is

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not directly to provide for removal from office, but it is to discourage unmerited removal by requiring vacancies to be filled only with persons who have passed competitive examinations according to requirements of the act or of rules adopted in pursuance of it. 22 Stat. 403, 406, §§ 2, 7 (Comp. St. 1916, §§ 3272, 3278); Flemming v. Stahl (D. C.) 83 Fed. 943, 944; Woods v. Gary, Postmaster General, 25 Wash. Law Rep. 591, 594, 595; Page v. Moffett (C. C.) 85 Fed. 38, 40. It is therefore not open to relator to claim both protection of the act of 1912 and exemption from that of 1913, upon any theory of lack of conflict between the two acts.

[3-5] There is another feature of the act of 1913 which deserves attention. Applying its language concretely, after the passage of the act the marshal might have required relator to execute a bond to him to secure faithful performance of official duty, and thereupon have revoked relator's appointment and named his successor, at the marshal's discretion. This does not appear to have been the method chosen. Its adoption, however, would have been, at most, a mere formality; and the allowance of a writ of mandamus would have been fruitless, since it could have been avoided by the marshal through mere demand of a bond and notice that the appointment would, upon presentation of the bond, be revoked. It results that, for reasons satisfactory to Congress, official positions like that of relator were taken out of the restraints of civil service legislation, including the restraint of the act of 1912, and placed within the plenary power and control of the marshal. The subject was within the power of Congress, and it is vain to urge that the courts can rightfully interfere with such legislation. The point that the act of 1913 was a "rider" to an appropriation bill cannot affect construction; and it should not be overlooked by relator's counsel that the act of 1912, upon which they rely, is of the same character.

The judgment must be affirmed.

The opinion of the learned trial judge follows:

SATER, District Judge. The relator, Palmer, claiming an unlawful revocation of his appointment as chief office deputy of the United States marshal, prays that a writ of mandamus issue requiring his restoration by the defendant to that position.

The relator, as a duly qualified person, was in 1892 appointed to a position in the competitive classified civil service in the post office department of the city of Cleveland. With the consent of the proper governmental departments, he was in 1910 transferred to the marshal's office, following which, to validate such transfer, he took a noncompetitive examination, was passed to the classified service, and filled the position of chief office deputy under the defendant's predecessor. On August 4, 1913, the defendant, after his designation and qualification as marshal, regularly appointed the relator as his chief office deputy at a salary of $2,000 per year, who thereupon qualified and entered upon the discharge of his duties. On January 13, 1916, defendant informed him of an intended change in his position, and at his instance cheerfully gave him a letter recommending him as a

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capable, painstaking, industrious man, who can prove his worth in any capacity, and who, in so far as the defendant knew, had excellently kept the records of the marshal's office. The parties discussed, as between themselves, the proposed change from time to time, and on February 8 the relator notified the defendant that he could not be removed from his position unless the defendant complied with the act of August 24, 1912 (37 Stat. 555), which provides, in so far as need be noticed, that no person in the classified civil service shall be removed therefrom, except for such cause as will promote the efficiency of the service and for reasons given in writing, and that the accused person is entitled to notice of his intended removal and of any charges preferred against him, and to a copy thereof, and also to reasonable time personally to answer the same in writing. The defendant having designated, with the assent of the Department of Justice, another person to succeed the relator, informed him on February 9 that the appointment of his successor would become effective on February 15. The relator at all times expressed a willingness to instruct his intended successor as to the duties devolving upon the chief office deputy, but disclaimed that such willingness should be construed as an acquiescence on his part to his ousting and to the appointment of his successor. He made known to defendant his readiness and willingness to perform the duties devolving on him in his position, that he would insist that he was entitled to continue therein until removed in accordance with the above-mentioned act, and that he would continue to claim compensation until his removal was thus made. On February 14 he was notified by the defendant in writing of the revocation of his appointment, the same to become effective on February 15. When he presented himself on the 16th and offered to continue the performance of his duties as before, he was refused permission so to do. He thereupon in writing tendered his services and demanded permission to discharge the duties pertaining to his position. The tender and demand were rejected and his salary discontinued. His successor, having qualified, was installed as chief office deputy. The relations between the parties continued friendly down to and including February 15. The defendant testified that he still thinks that the relator is a capable man. The expressed cause for revocation of the appointment was political reasons, no other cause therefor being given to the relator, or, in so far as the record shows, to any other person. The only other matter which was known to the defendant prior to February 16, and which, although unexpressed, influenced him, according to his evidence, in recalling the appointment, was brought out in the evidence taken under exception that the relator was the cause of disharmony in the office, due, it would seem, to orders given by him and his suggesting his own friends as guards in nearly all instances for the removal of prisoners, the other deputies feeling that they ought to have their friends to make such trips; but it does not appear that the persons thus suggested were not competent or rendered inefficient service, or what the character of the orders were, the inference being that they pertained to the conduct of the business of the office. At the time of the hearing the court was and is still of the

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opinion that, in whatever aspect the case is viewed, the evidence as to the undisclosed want of harmony was unimportant; for, if the relator could be removed only in the manner specified in the act of August 24, 1912, his ousting was unlawful, and, on the other hand, if the provisions of such act were not applicable to the relator's case on account of his being no longer protected in his position, as claimed by defendant, by the civil service law, the defendant was at liberty, at his pleasure, to revoke the appointment. If such act is not applicable, and if the act of 1913 were silent on the power to revoke, the right so to do might still exist (People v. Lathrop, 142 N. Y. 113, 116, 36 N. E. 805); but this point need not be decided.

[6-8] In the absence of constitutional or statutory regulations, the power of appointment carries with it as an incident the power to remove when no definite term is attached to the office by law. Re Hennen, 13 Pet. 230, 259, 10 L. Ed. 136; Parsons v. United States, 167 U. S. 324, 331, 17 Sup. Ct. 880, 42 L. Ed. 185; Morgan v. Nunn (C. C.) 84 Fed. 551, 552; People v. Robb, 126 N. Y. 180, 182, 27 N. E. 267; People v. Fire Com'rs, 73 N. Y. 437. When an appointee holds at the will and discretion of his superior, he is subject to removal at pleasure, the power of removal residing in the person in whom is vested the power of appointment. Re Hennen, 13 Pet. at page 259; Keim v. United States, 177 U. S. 293, 294, 20 Sup. Ct. 574, 44 L. Ed. 774; Robertson v. Coughlin, 196 Mass. 539, 542, 82 N. E. 678, 13 Ann. Cas. 804. It is also well settled that civil service regulations made by the civil service commissioners and the President, and promulgated by the latter, do not have the effect and force of law, nor can the courts enforce them as such, or entertain jurisdiction to review the action of an appointing officer in removing an employé. The President, nevertheless, may enforce them by removing any person who refuses to abide by them. Morgan v. Nunn (C. C.) 84 Fed. at page 553; Flemming v. Stahl (D. C.) 83 Fed. 940, 941; Page v. Moffett (C. C.) 85 Fed. 38; Carr v. Gordon (C. C.) 82 Fed. 373, 379; Taylor v. Taft, 24 App. D. C. 95. The act of August 24, 1912, however, specifically defines the conditions on which removals from the classified civil service list may be effected. The defendant did not, in eliminating the relator and substituting another in his stead, comply with the requirements of that act. His position, the correctness of which is controverted by relator, is that his action is fully warranted by the act of October 22, 1913 (38 Stat. 208, c. 32), which provides that any deputy marshal, who may be required by law or by authority or direction of the United States marshal to execute a bond to such marshal to secure the faithful performance of official duties, may be appointed by the marshal requiring such bond without regard to the provisions of the act of Congress to regulate and improve the civil service, approved January 16, 1883 (22 Stat. 403), and the amendments thereto, or any rule or regulation made in pursuance thereof; and the marshal so requiring such bond shall have power to revoke the appointment of any subordinate officer or employé and appoint his successor at his discretion, without regard to such last-named act, amendments thereto, or rules and regulations made in pursuance of

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the same. Whether such act wholly put the marshal's office without the operation of such law, amendments, rules, and regulations, and vested in the defendant the power to make appointments and revoke them at his discretion, when and as he chooses, is the vital question for decision. The act under which the marshal justifies purports thus to relieve him in the matter of appointments and revocations. If the act of 1912 is but an amendment to the original act of 1883, the defendant's position is correct; if, however, the act of 1913 does not exempt the defendant from the procedure specified in the act of 1912 touching removals, the relator ought to prevail.

[9] The act of 1912 is not a supplemental act in that it is not an independent law (State v. Hubbard, 148 Ala. 391, 394, 41 South. 903), and does not so operate as not to alter or modify the original act. 26 Am. & Eng. Ency. Law, 708; United States v. Stocking (D. C.) 87 Fed. 857, 858; McCleary v. Babcock, 169 Ind. 228, 233, 82 N. E. 453. Prior to August 24, 1912, the only statutory provision regulating the removal of a person in the classified civil service list was found in section 13 of the act of 1883 (Comp. St. 1916, § 10290), which declares that no such officer or employé of the United States as is mentioned therein shall be discharged, promoted, degraded, or changed as to official rank or compensation, or shall be given a promise or subjected to a threat in any of such respects, for giving, withholding, or neglecting to make any contribution of money or valuable thing for any political purpose. See, also, Taylor v. Taft, 24 App. D. C. 95. Indeed, it would seem from the debates in Congress mentioned in Flemming v. Stahl (D. C.) 83 Fed. 940, that it was not intended that the act of 1883 should interfere with the right of removal, except to deny it to the extent above mentioned. The purpose of the act of 1912 was to change the existing law by restricting the discretionary power of superior officers in the matter of removals. It was designed to give greater security to those occupying subordinate positions, and thereby to improve the public service, by requiring that removals shall be for cause and after a hearing. An amendment to an act, in the absence of a constitutional prohibition, may be effected by a mere addition thereto (State v. Hubbard, 148 Ala. at page 395; Henderson v. Galveston, 102 Tex. 163, 169, 114 S. W. 108), or by adding other provisions (26 Am. & Eng. Ency. Law, 706; 36 Cyc. 1054). A law is amended when it is, in whole or in part, permitted to remain, and something is added to or taken from it, or it is in some way changed or altered to make it more complete or perfect, or to fit it the better to accomplish the object or purpose for which it was made, or some other object or purpose. Falconer v. Robinson, 46 Ala. 340, 348. The act of 1912 is amendatory of the previous civil service law, adding thereto an additional section to remove a fault and better the then existing law.

[10, 11] It was competent for Congress to exempt the marshal's office from the provisions of all laws relating to civil service and to subject the deputies to the terms of the exempting enactment. People v. Keller, 158 N. Y. 187, 52 N. E. 1107. The act of 1912 is general; that of 1913 is specific. It is not ambiguous. By express terms

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it relieves the marshal from the method of removal prescribed by the preceding act and is controlling. This view finds support in the settled rule of statutory construction that general legislation must give way to special legislation on the same subject, whether the provisions are found in the same statute or in different statutes; and generally the provisions must be interpreted so as to embrace only cases to which the special provisions are not applicable. Magone v. King, 51 Fed. 525, 526, 2 C. C. A. 363 (C. C. A. 2), Peck v. Jenness, 7 How. 612, 622, 12 L. Ed. 841, Kepner v. United States, 195 U. S. 100, 125, 24 Sup. Ct. 797, 49 L. Ed. 114, 1 Ann. Cas. 655, People v. Mayor, 82 N. Y. 491, and Lawrence v. City of Cincinnati, 3 Am. Law Rec. 597, 602, are pertinent. The relator's term of service having expired with that of the defendant's predecessor, he saw fit to accept an appointment to a position, subject, it is true, to the law as it then existed, but chargeable with knowledge that Congress, which enacted that law and created the position which he accepted, might further legislate on the same subject-matter and the position so accepted by him. It did in fact modify such existing law, and the relator cannot be heard to complain that the marshal exercised the added power conferred on him by the later enactment. The act of October, 1913, does not say that it shall be inapplicable to those holding under a prior appointment. The wisdom, but not the validity, of an act is assailed. As to its wisdom, the court may not question.

Buckingham v. Steubenville & Ind. R. Co., 10 Ohio St. 25, on which the relator relies, has been examined, but it is not thought to be helpful. An analogous case, however, is that of People v. Whitlock, 92 N. Y. 191, from which it appears that an act of the Legislature passed in 1869 provided that police commissioners might be removed for cause. An amendment of 1881 omitted this provision and gave the mayor the power to remove any commissioner for cause sufficient to himself. Like the act of 1913, it substituted one tribunal for another, and a new mode of procedure for that which had prevailed. The court, speaking for the removed commissioner, said (92 N. Y., at page 198):

> "He can no more complain that he is proceeded against by the altered mode than a suitor in our courts can claim to maintain or resist a cause of action by the procedure in force when it accrued. * * * The office was created by the Legislature, and they might abridge its term by express words, or specify an event upon the happening of which it should end. * * * In this case the event specified by the Legislature is removal by the mayor."

On the question of notice and a hearing before final action by the mayor, it was held that the entire matter was within the control of the Legislature, and, as it gave the power to appoint, it could also give the power to remove; and in the absence of provisions that removal should be only for cause and upon notice, it was enough, if the mayor thought there was sufficient cause for removal, even if no opportunity was given to be heard. Cause, it was said, might or might not exist except in his imagination, but his conclusion was final.

[12, 13] The teachings of Re Hennen and People v. Lathrop are, as we have seen, that the subordinate who holds at the discretion of a superior appointing power is subject to removal at pleasure. Under such circumstances the power of removal is absolute, it being vest-

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ed in the unlimited discretion of the removing officer, to be exercised at such time and for such reasons as he may deem proper and sufficient. As the relator held at the pleasure of the defendant, and as the defendant exercised the power of removal at his discretion, the relator could be removed without notice or a hearing. Mechem, Public Officers, §§ 448, 454. Considering the state of the law and the facts, a writ of mandamus will not issue to control such discretion. Mechem, § 945; Dillon, Munic. Corp. (4th Ed.) § 250; People v. Drake, 43 App. Div. 325, 60 N. Y. Supp. 309, 312. People v. Mayor, 82 N. Y. 493, 494, thus states the rule:

"It would seem, however, to be quite clear that, whenever a statute in express terms gives a discretionary power to any person, to be exercised by him upon his own pleasure, he is thus made the sole and exclusive judge as to the propriety of its exercise, and in such a case his will or private opinion must stand in place of any reason. Such a power is not to be construed as a judicial discretion, to be regulated according to the known rules of law. * * * It may be arbitrary and fanciful, but such was the condition of the relator's official tenure. He took office at the pleasure of the mayor, and his pleasure, by whatever reason influenced, is the measure of its term."

That the defendant, in exercising his power to remove, did not act in a judicial capacity, see State v. Hawkins, 44 Ohio St. 115, 5 N. E. 228; State v. Sullivan, 58 Ohio St. 504, 514, 51 N. E. 48, 65 Am. St. Rep. 781; State v. Board of Police Com'rs of Cincinnati, 7 Ohio Dec. 326.

Writ of mandamus denied. Petition dismissed.

(244 Fed. 385)

SUPREME COUNCIL OF ROYAL ARCANUM v. HOBART.

(Circuit Court of Appeals, First Circuit. June 15, 1917. On Petition for Rehearing, August 25, 1917.)

No. 1285.

1. APPEAL AND ERROR ⟹185(2)—REVIEW—JURISDICTIONAL QUESTIONS.
   It is the duty of the Circuit Court of Appeals to see that the statutory jurisdiction of the District Court has not been exceeded, irrespective of any question raised by the parties in regard to the matters.

2. COURTS ⟹282(3)—FEDERAL COURTS—JURISDICTION—CONSTITUTIONAL QUESTIONS.
   Assuming that St. Mass. 1911, c. 628, § 25, providing that no application for injunction against, or proceedings for dissolution of, or the appointment of a receiver for, any fraternal benefit society, shall be entertained, unless made by the Attorney General, violates the rights of certificate holders under Const. U. S. Amend. 14, this does not give federal courts jurisdiction of a suit for a receiver, unless such violation is so connected with the real cause of action set forth as to form an essential part thereof.

3. COURTS ⟹282(3)—FEDERAL COURTS—JURISDICTION—CONSTITUTIONAL QUESTIONS.
   The violation of a certificate holder's rights by St. Mass. 1911, c. 628, § 25, was not an essential part of the cause of action in a suit by him for the appointment of a receiver for a fraternal society on the ground that it was conducting its business illegally, improvidently, and fraudulently,

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and as a result would soon become insolvent, where he had not tried to get the state officials to proceed against the society according to the statute, and defendant had made no objection to such an attempt, and had not availed itself of the statute to his prejudice, and hence a federal court had no jurisdiction.

4. COURTS ⟹280—DETERMINATION OF QUESTION OF JURISDICTION—PRESUMPTIONS.

In determining whether the alleged unconstitutionality of a state statute gives jurisdiction to a federal court, the presumption is that, if the statute is unconstitutional, the state courts will so declare when the question is brought before them.

5. RECEIVERS ⟹35(1)—APPOINTMENT WITHOUT NOTICE—DISCRETION.

Where a suit for the appointment of a receiver for a fraternal insurance society alleged that it was conducting its business illegally, improvidently, and fraudulently, and would soon become insolvent as a result, and that clear and irreparable loss and injury would thereby be suffered by plaintiff and other certificate holders, and an accompanying affidavit alleged that its funds were in imminent danger of being removed from the state, there was no abuse of discretion in appointing a receiver without notice; the appointment being subject to be vacated or modified eight days later, after hearing any party aggrieved, and not to become permanent until such hearing.

6. RECEIVERS ⟹35(3)—APPOINTMENT WITHOUT NOTICE—RIGHT TO OBJECT.

Where the society appeared and was heard before the appointed hearing, obtaining modifications of the decree, whereby exercise of the receiver's active duties was suspended until further order, and his custody of defendant's property was so limited as not to prevent it from carrying on its current and usual business, it was in no position to claim that any omission of due notice had seriously prejudiced its rights.

On Petition for Rehearing.

7. COURTS ⟹405(18)—CIRCUIT COURT OF APPEALS—REHEARING.

In a case in which the Circuit Court of Appeals ordered a dismissal of the bill for want of jurisdiction, though it discussed other questions argued by the parties, a rehearing upon such questions would not be ordered, as no rehearing would alter the result.

8. COURTS ⟹405(18)—CIRCUIT COURT OF APPEALS—REHEARING.

In such case, it was not a ground for a rehearing that after the argument and submission of the appeal, but before the decision was handed down, a party intervened, thus giving the necessary diversity of citizenship, where this was not brought to the court's attention until after the opinion was handed down.

9. COURTS ⟹407(5)—CIRCUIT COURT OF APPEALS—SCOPE OF REVIEW.

Under Judicial Code (Act March 3, 1911, c. 231) § 129, 36 Stat. 1134 (Comp. St. 1916, § 1121), providing that where an injunction shall be granted, continued, etc., or an interlocutory order or decree made appointing a receiver, an appeal may be taken from such interlocutory order or decree to the Circuit Court of Appeals, notwithstanding an appeal upon final decree might be taken directly to the Supreme Court, the Circuit Court of Appeals, on appeal from such an interlocutory decree, may pass upon the jurisdiction of the District Court.

Appeal from the District Court of the United States for the District of Massachusetts; Edgar Aldrich, Judge.

Suit by Arthur L. Hobart against the Supreme Council of the Royal Arcanum. From a decree appointing a receiver, and decrees modifying the original decree, defendant appeals. Reversed and remanded, with directions.

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Howard C. Wiggins, of Rome, N. Y. (Curtis H. Waterman, of Boston, Mass., on the brief), for appellant.

Harvey H. Pratt, of Boston, Mass. (James A. Tirrell, of Boston, Mass., on the brief), for appellee.

Before DODGE and BINGHAM, Circuit Judges, and BROWN, District Judge.

DODGE, Circuit Judge. [1] Whether or not the District Court had jurisdiction is first to be determined. It is our duty to see to it that the statutory jurisdiction of that court is not exceeded, irrespective of any question raised by the parties in regard to the matter. Louisville, etc., Co. v. Mottley, 211 U. S. 149, 152, 29 Sup. Ct. 42, 53 L. Ed. 126.

The plaintiff, a Massachusetts citizen, holds a "death benefit certificate" for $500, issued December 26, 1916, by the defendant, a fraternal benefit society organized under the laws of Massachusetts.

On April 13, 1917, upon a bill in equity that day filed by him in the Massachusetts District Court, a receiver was appointed to take charge of the defendant's business and assets. The decree appointing the receiver was later modified by subsequent decrees, entered April 17 and April 20, 1917, whereby exercise of his active duties was suspended until further order of the court, and his custody of the defendant's property so limited as not to prevent it meanwhile from carrying on its current and usual business.

The present appeal is taken by the defendant from the above decrees under section 129 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1134 (Comp. St. 1916, § 1121). The appellee and appellant are hereafter referred to as plaintiff and defendant, respectively.

The plaintiff's bill is brought on behalf of himself and all other death benefit certificate holders in good standing, who may join therein and contribute to the expense of the suit. No other holders of such certificates have yet so joined.

The bill alleges, in substance, that the defendant is conducting its business illegally, improvidently, and fraudulently, that it is now or will soon become insolvent as a result, and that great and irreparable loss and injury will thereby be suffered by the plaintiff and other holders of similar certificates. The relief prayed for is an accounting of the defendant's assets and liabilities, and the appointment of a receiver to wind up its business, in order that its assets may be distributed under the court's direction.

Both parties being Massachusetts citizens, the Massachusetts District Court can have no jurisdiction of such a suit, unless the bill shows a federal question to be involved in the cause of action, and the amount in controversy to be more than $3,000.

The only allegations of the bill claimed to present a federal question are found in the second paragraph thereof. They are in substance that the defendant is conducting its business subject to a Massachusetts statute, namely, chapter 628 of the Acts of 1911, and that sections 24 and 25 of said chapter deprive the plaintiff of the equal protection of the law, the equal protection of his property rights, and the right

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to be heard in the protection of said rights by the Massachusetts courts, in violation of the Fourteenth Amendment to the federal Constitution.

The Massachusetts statute thus referred to is entitled "An act to provide for the control and regulation of fraternal benefit societies." Sections 24 and 25, of which the above complaint is made, are quoted at length in paragraph 2 of the bill.

By section 24 power is given to the state insurance commissioner to inspect and investigate the affairs of any such society, and, whenever satisfied that its business is being conducted in a manner such as is charged in this bill, to present the facts to the state Attorney General, who, if he deem the circumstances to warrant such a course, is then to begin a quo warranto proceeding in a proper court. If after due notice and hearing, as provided by said section, the court finds that the society should be closed, it is to enjoin further business and appoint a receiver to wind up affairs and distribute its funds under the court's direction.

Section 25, which contains the principal provisions alleged to violate the plaintiff's constitutional rights, directs that:

> "No application for injunction against, or proceedings for dissolution of, or the appointment of a receiver for, any such * * * society * * * shall be entertained by any court in this state unless the same is made by the Attorney General."

[2] The above are provisions which have formed part of the Massachusetts legislation regarding fraternal benefit societies since 1898. See chapter 474, § 19, of the Acts of that year. Assuming that they violate any constitutional right belonging to a certificate holder like the plaintiff, it must appear from the bill, before a federal question can be said to be involved as a ground of jurisdiction, that such violation is so connected with the real cause of action which the bill sets forth, as to form an essential part thereof. In other words, whether the remedy sought from the District Court is obtainable or not must depend upon the result of the constitutional question raised as to the validity of said provisions. New Orleans v. Benjamin, 153 U. S. 411, 14 Sup. Ct. 905, 38 L. Ed. 764; Bankers', etc., Co. v. Minneapolis, etc., Co., 192 U. S. 371, 385, 24 Sup. Ct. 325, 48 L. Ed. 484; Hull v. Burr, 234 U. S. 712, 720, 34 Sup. Ct. 892, 58 L. Ed. 1557.

[3] The plaintiff has never tried, so far as shown, to get the state officials to proceed against the defendant according to the above provisions; still less is any opposition by the defendant to such an attempt shown. The bill does not show that the defendant has in any way availed itself of them to the plaintiff's prejudice. That it is conducting its business subject to them, as part of the state legislation applicable to all such business, is not enough to render the defendant liable to any such charge. Nothing is found in said provisions which in any way purports to permit or justify maladministration of said business, such as that against which the bill prays relief. The District Court is not asked to enjoin their enforcement, and could not do so if asked.

[4] A suit to obtain the relief prayed for in the bill is not a suit which the federal statutes allow one Massachusetts citizen to bring against another in the federal courts. If it is true that unconstitution-

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al limitations are imposed by the Massachusetts statutes upon the bringing of such suits, the right of one Massachusetts citizen to resort to a federal court for such relief against another Massachusetts citizen is not thereby enlarged. The method provided by existing statutes for raising a question of constitutionality as to any such limitations, in the federal court, is by raising it first in a Massachusetts court, and then by appealing to the Supreme Court from a decision sustaining them. The presumption to be made here is that, if such limitations are objectionable because unconstitutional, the Massachusetts courts will so declare when the question is brought before them. Defiance Water Co. v. Defiance, 191 U. S. 184, 24 Sup. Ct. 63, 48 L. Ed. 140; Gundall v. Manhattan Rwy. Co. (D. C.) 205 Fed. 410. Should they fail to do so, the Supreme Court of the United States has power to correct their error, under section 237 of the Judicial Code (Comp. St. 1916, § 1214). In Bogni v. Perotti, 224 Mass. 152, 112 N. E. 853, L. R. A. 1916F, 831, a decision cited to us by the plaintiff, the Massachusetts Supreme Court upheld the principle for which the plaintiff contends, viz.: That the power of courts to afford equitable relief cannot be impaired by legislation in such a way as to prevent its use in favor of one property owner while preserving it for the benefit of others. If the same principle is rightly applicable to the legislation of which the plaintiff complains, the same court will of course apply it thereto.

In Ex parte Young, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764, upon which the plaintiff has also relied, the federal question held to have given jurisdiction to the federal court, where the requisite diversity of citizenship did not exist, was presented by a bill seeking to enjoin the enforcement by state officials of the state statute complained of as unconstitutional.

We are of opinion, in view of the foregoing considerations, that those allegations of the bill which complain of the above provisions of Massachusetts law as violating constitutional rights of the plaintiff, do not constitute an essential part of the cause of action set forth, and are in no way necessary thereto. We hold, therefore, that the bill does not disclose any federal question, and that the District Court was without jurisdiction to entertain it.

We need not, in view of this result, determine the further question raised, whether or not the matter in controversy as set forth can be said to exceed $3,000.

We may add, however, in view of what has been discussed in the briefs before us, though without expressing any opinion upon the constitutionality of the statutory provisions in question, that similar provisions are found in the legislation of many other states, relating to similar societies or to insurance companies, that there have been several decisions sustaining them, by various state courts of last resort, against objections to their constitutionality, and that no decision sustaining any such objection has been brought to our attention. They establish no such penalties for their violation as were held in Ex parte Young to have denied the equal protection of the law, by deterring parties from testing their validity in the courts.

We may further add that the plaintiff appears by his own allegations to have received the certificate for $500, on which his suit is

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based, at a time when the above provisions had for 18 years been part of the Massachusetts legislation applicable. It is true that he also alleges that it was purchased by him in 1916 to replace an earlier certificate for $3,000 purchased about 1884, from which it is inferable that he had continued during 18 years to pay the assessments called for and enjoy the protection afforded by said former certificate, without raising any objection after the enactment of said provisions in 1898. Since the laws of a state, existing when a contract is made and affecting the rights of the parties thereto, enter into and become part thereof, so as to be obligatory on all courts assuming to give a remedy thereon (Barnitz v. Beverly, 163 U. S. 118, 16 Sup. Ct. 1042, 41 L. Ed. 93; Bradley v. Lightcap, 195 U. S. 1, 20, 24 Sup. Ct. 748, 49 L. Ed. 65; Long Sault, etc., Co. v. Call, 242 U. S. 272, 277, 37 Sup. Ct. 79, 61 L. Ed. 294), we think the plaintiff would have to be regarded, upon his own showing, as having waived any right to assert, as between himself and the defendant, that the statutory provisions whereof he complains are not binding upon him.

[5, 6] Upon the assumption that the bill presents a case within the District Court's jurisdiction, as we think it does not, we find no error in the appointment of a receiver or the injunction issued in connection with said appointment. It is said that the issue of said injunction violated section 17 of the Clayton Act (38 Stat. 737), and equity rule 73 (198 Fed. xxxix, 115 C. C. A. xxxix); but the defendant does not satisfy us that either said section or said rule necessarily applies to the usual injunction included in a decree appointing a receiver for the purpose of preventing interference with his control and custody. As to the claim that there was no sufficient notice to the defendant, the appointment was made subject to be vacated or modified eight days later, after hearing any party aggrieved, and was not to become permanent until such hearing. While the allegation in the affidavit which accompanied the bill, that the defendant's funds were in imminent danger of being removed out of Massachusetts, is not so specific as to facts as might be desired, there has been no suggestion that it was without foundation in fact, and it so far indicated immediate danger of irreparable injury as to prevent a finding that there was any abuse of discretion in entering the decree of April 13, 1917. After appearing and being heard before the hearing appointed for April 21st, and after having obtained thereby the modifications effected by the decrees of April 17th and April 20th, we could hardly regard the defendant as in a position to claim that any omission of due notice to it in the proceedings has seriously prejudiced its rights.

Our conclusion that the bill presents no case within the District Court's jurisdiction requires us to order its dismissal, without awarding costs of this appeal to either party.

The decrees of the District Court, entered April 13, 17, and 20, 1917, are reversed, and the case is remanded to that court, with directions to dismiss the bill, and neither party recovers costs in this court.

On Petition for Rehearing.

PER CURIAM. The interlocutory decrees appealed from were reversed, and dismissal ordered, upon the sole ground that, in our opin-

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ion, the bill presented no federal question, and did not, therefore, state a case within the District Court's jurisdiction.

[7] Although we have expressed our opinion upon certain questions which were fully argued by the parties before us, not directly involving the point decided as above, no rehearing upon those questions would alter the result if, as we hold, no federal question was presented. This disposes of the first two grounds for rehearing set forth in the present petition.

[8] The third ground set forth is that on June 7, 1917, a certificate holder said to be "of Nashua, in the state of New Hampshire," has "come into the District Court and asked to intervene." If said certificate holder is a New Hampshire citizen, and could therefore, if admitted as a party plaintiff, assert the existence of jurisdiction based on diverse citizenship, as the plaintiff in the bill as it stands cannot, the fact constitutes no ground for rehearing of the appeal we have already heard and decided, but shows, at most, only that a different case may at some time be presented in the District Court. If said application for leave to intervene was filed in that court on June 7th, it was filed after argument and submission of the appeal here on May 16th, but before June 15th, when our decision thereon was handed down. If said application was to be brought to our attention for any purpose, this should have been done before the latter date. No suggestion to us regarding it, however, was ever made until the present petition for rehearing was filed on July 12th.

[9] As to the fourth ground for rehearing alleged in the petition, the plaintiff has, at our request, submitted authorities which have been duly considered. He denies jurisdiction in this court to determine, as it did, the question whether or not the bill stated a case within the District Court's jurisdiction.

In appeals from final decrees, under sections 128 and 238 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1133, 1157 [Comp. St. 1916, §§ 1120, 1215]), where the jurisdiction of the District Court as set out in the bill is based solely on a constitutional question, the appeal lies to the Supreme Court, and cannot be taken to a Court of Appeals, as the authorities relied on undoubtedly show. But in appeals like this, under section 129 of the Code, not from final, but from interlocutory, decrees below, the questions to be passed upon by the Court of Appeals are not limited as above. In such appeals the Court of Appeals is authorized—

> "to review the whole of the interlocutory decree, not merely the part granting the injunction, and also to determine whether there was any insuperable objection, in point of jurisdiction or merits, to the maintenance of the suit, and if there was, to direct a final decree dismissing the bill."

See U. S. Fidelity Co. v. Bray, 225 U. S. 205, 214, 32 Sup. Ct. 620, 56 L. Ed. 1055, and the prior decisions of the Supreme Court there cited. See, also, Seattle, etc., Co. v. Seattle, etc., Co., 185 Fed. 365, 368, 107 C. C. A. 421.

It is true that these decisions were before the Judicial Code became effective, and deal, not with section 129 in its present form, but with section 7 of the Court of Appeals Act as amended in 1906. We find

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no difference, however, material for the present purpose, between the legislation therein considered and section 129 which incorporates it in the Code, whatever the changes thereby effected in respects not here material.

The petition for rehearing is therefore denied.

(244 Fed. 392)

JARRETT et al. v. HALSEY et al.

(Circuit Court of Appeals, Fourth Circuit. July 27, 1917.)

No. 1526.

1. PUBLIC LANDS ⟹186—WEST VIRGINIA—FORFEITURE.

Under Act Va. March 22, 1842 (Acts 1842, c. 13), declaring that all the right, title, and interest which shall be vested in the commonwealth in any lands west of the Allegheny Mountains by reason of nonpayment of taxes, or the failure of the owners to cause the same to be entered, shall be absolutely transferred to and vested in any person or persons other than those for whose default the same may have been forfeited, for so much as such persons may have just title or claim to or derived from under any grant bearing date previous to January, 1843, who shall have discharged all taxes duly assessed and charged against him or them under such lands, and all taxes that ought to have been assessed or charged thereon, one claiming that a senior grant of such lands was on forfeiture, vested in him because of payment of taxes has the burden of showing strict compliance with the act, and hence defendants, who claimed under a grant subsequent to that of plaintiffs' predecessor which had been forfeited for nonpayment of taxes and resold, cannot defeat plaintiffs' title where they failed to show a listing of the land for taxation and payment of taxes by their predecessors for several years after the execution of the grant under which defendants claimed; the purpose of the act being to protect bona fide holders and claimants who had paid taxes against the rights of rival claimants who obtained grants at a nominal cost, but failed to pay the taxes.

2. PUBLIC LANDS ⟹186—FORFEITURE TO STATE—TRANSFER OF TITLE.

Where on behalf of defendants who claimed land in West Virginia only an undivided interest in the entire tract was listed or assessed, the failure to have assessed and pay the taxes on the remainder operated under Const. West Va. art. 13, § 3, as a forfeiture of the entire tract, and title passed to a rival claimant as by adverse possession who had paid taxes thereon for five years.

3. ABATEMENT AND REVIVAL ⟹12—GROUNDS OF ABATEMENT.

The pendency of a suit in a state court is no ground for plea in abatement to a suit on the same matter in a federal court.

4. ABATEMENT AND REVIVAL ⟹5—GROUNDS OF ABATEMENT.

Causes at law and in equity are so dissimilar that the pendency of one cannot be pleaded in abatement of the other.

In Error to the District Court of the United States for the Southern District of West Virginia, at Charleston; Benjamin F. Keller, Judge.

Action by R. Ogden Halsey and others against Irvin Jarrett and others. There was a judgment for plaintiffs, and defendants bring error. Affirmed.

This is an action of ejectment instituted in the District Court of the United States for the Southern District of West Virginia by plaintiffs, R. O. Halsey,

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and others, against Irvin Jarrett and others, defendants, to recover a parcel of land situate in Fayette county, W. Va.

The plaintiffs base their title on a survey made by James Welch of 4,500 acres of land which was situated in the county of Greenbrier in 1802, and a grant followed in 1805. In 1818 this land became situate in the county of Nicholas, and afterwards, about 1831, most of it became situated in the county of Fayette. Under acts of the Legislature of Virginia forfeiting lands for the nonpayment of taxes, this parcel became forfeited and was sold in the summer of 1843 by the commissioner of delinquent and forfeited lands for the county of Fayette, and the plaintiffs claim title under this sale by deed from Alfred Beckley, commissioner of delinquent and forfeited lands of Fayette county, which deed is dated on the 16th day of June, 1843.

The title of Irvin Jarrett and others is based upon a survey made on the 14th day of August, 1799, for 600 acres for Henry Banks. This was followed by a grant in the year 1822 from the Governor of Virginia for this six hundred acres. The reason for the holding up of the grant so long was the fact that there was a suit pending between Henry Banks, as plaintiff, and Duvall and others, as defendants, in a court in Richmond, Va., involving the ownership of the land when the grant thereof was made. In 1824, as shown by the deed this 600-acre tract of land was sold in this suit by a special commissioner therein appointed, and became the property of Aaron Stockton and Joel Shrewsbury.

It is claimed by the plaintiffs in the ejectment suit that, although their survey was late, their grant was first, and, there being no exceptions in their grant, all the title of the commonwealth was vested in James Welch under the grant of 1805.

To meet this, the defendants in the ejectment suit claim that the lands so bought by Stockton and Shrewsbury were duly assessed with and the taxes paid thereon up to and including the year 1842.

By an act of the Legislature of Virginia passed on the 22d day of March, 1842 (Acts 1842, c. 13) it was provided in the third section that any forfeited titles then in the state of Virginia should be vested in any person having just title and claim thereto under any grant of the commonwealth bearing date prior to the 1st day of January, 1843, who shall have discharged all taxes duly assessed and charged against him upon such land. The section in question is in the following language: "And be it further enacted, that all the right. title and interest which shall be vested in the commonwealth in any lands or lots lying west of the Allegheny Mountains, by reason of the nonpayment of the taxes heretofore due thereon, or which may become due on or before the first day of January next, or of the failure of the owner or owners thereof to cause the same to be entered on the books of the commissioners of the proper counties, and have the same charged with taxes according to law, by virtue of the provisions of the several acts of assembly heretofore enacted, in reference to delinquent and omitted lands, shall be and the same are hereby absolutely transferred to and vested in, any person or persons (other than those for whose default the same may have been forfeited, their heirs or devisees), for so much as such person or persons may have just title or claim to, legal or equitable, claimed, held or derived from or under any grant of the commonwealth, bearing date previous to the first day of January eighteen hundred and forty-three, who shall have discharged all taxes, duly assessed and charged against him or them upon such lands, and all taxes that ought to have been assessed or charged thereon, from the time he, she or they acquired title thereto, whether legal or equitable: Provided, that nothing in this section contained, shall be construed to impair the right or title of any person or persons, who shall bona fide claim said land by title, legal or equitable, derived from the commonwealth, on which the taxes have been fully paid up according to law, but in all such cases the parties shall be left to the strength of their titles respectively."

It was shown that the lines on the trial map show the location of the Banks survey and grant of 600 acres under which Jarrett and others claim, and also the lines of the land in controversy. Under the agreed statement of facts it appears that about 172 acres of the Banks grant interlocked with the Welch grant. The greater part of the Banks grant lay in the county of Nicholas,

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leaving about 172 acres thereof in what is now the county of Fayette, but which was prior to its formation in the county of Nicholas.

George W. McClintic, of Charleston, W. Va. (McClintic, Mathews & Campbell, of Charleston, W. Va., and W. C. Reddy of Summersville, W. Va., on the brief), for plaintiffs in error.

E. C. Harrison and Buckner Clay, both of Charleston, W. Va. (Browning & Browning, of Orange, Va., on the brief), for defendants in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge (after stating the facts as above). In this action of ejectment the court below directed a verdict and judgment for plaintiffs, and the defendants have sued out this writ of error. The parties will be designated as they stood below. This controversy involves an overlap of 172 acres of land.

The plaintiffs, Halsey and others, claim under a Virginia grant of 1805 to one Welch of 4,500 acres which became forfeited and was in 1842 divided into lots and sold under the Virginia act of 1837, as amended in 1838. The defendants claim under a grant of the state of Virginia in 1822 to Banks for 600 acres.

By stipulation the substantial facts have been agreed and the issues have been narrowed by counsel to the determination of two questions:

First. Was the forfeited Welch title by operation of the legislative act of Virginia of March 22, 1842, transferred to and vested in the alienees of the Banks title so that the latter in law became the senior title?

Second. If so, did the Banks title subsequently become forfeited to the state by reason of nonpayment of taxes and under section 3, art. 13, of the Constitution of West Virginia, in turn become vested in plaintiffs as alienees of the purchasers of the Welch title under the sale of that title by the school commissioners under the act of 1842?

It is difficult to determine these questions intelligently without, to a limited extent, outlining the policy of the state of Virginia relative to lands lying west of the Alleghenies now largely embraced in the state of West Virginia.

From such cases as Fay v. Crozer (C. C.) 156 Fed. 486, Atkins v. Lewis, 14 Grat. (Va.) 30, and text-books such as Hutchinson's Land Titles (West Virginia), we find that Virginia in 1779 established, by legislative act, a land office and authorized the sale of lands west of the Alleghenies for two cents an acre to any one who, at his own expense, would cause a survey to be made, warrant and entry to be filed and patent secured for the number of acres selected and applied for. Doubtless the purpose of this legislation was twofold: First, to secure revenue by way of fixed and settled taxation; and, second, to secure pioneers to go and settle in these unbroken forests in the mountains. The legislation was, however, so loosely drawn and so limited in scope that it in practical effect thwarted both of its purposes and led to great confusion and litigation touching titles. Speculators made surveys of large tracts, possibly by making one or two corners and laying off the remaining lines on paper by protraction and naming other corners by

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guess; others in a like way laid off, entered, and secured patents for similar large tracts, regardless of whether they covered or overlapped former surveys until it was not unusual for the same land to be the subject of several different grants. The owners of these grants lost confidence in their integrity and failed to pay taxes assessed, and persons seeking to settle found themselves wholly unable to determine from whom to buy a sound title. The result was that many acts were passed with a view to correct the evils thus created. Forfeitures for failure to pay taxes were declared, and then these forfeitures were repealed by other acts allowing redemption to be made within specific times. Finally, in 1837 and 1838, acts were passed prohibiting redemption of all delinquent and forfeited lands from and after July 1, 1838, and providing for their sale for the benefit of the school fund by a commissioner of delinquent and forfeited lands appointed in each county, under decree of the circuit courts of law and chancery.

By these acts these forfeited titles, good and bad, for what they were worth, became reinvested in the commonwealth. By their sale provisions it was proposed to start over again, and by means of the court's decree of confirmation and authorization the deed of the commissioner practically became a new grant from the commonwealth for the land sold.

But almost from the beginning of these forfeiture acts and those relieving such forfeitures and extending the times in which to redeem, it was apparent that actual settlers had purchased from junior grantees and were in actual possession and paying taxes to the state. To protect those, provisions were made allowing such settlers in actual possession and paying taxes to hold their lands as against senior forfeited titles.

In March, 1842, an act was passed that such forfeited senior title should be transferred to the holder of a junior grant, provided such junior grantee had paid all taxes charged and chargeable against him, thus making the junior grantee in effect, to the extent of any overlap, the senior upon the sole condition that he had upon his part paid all taxes charged or chargeable upon the lands embraced in his junior grant, and not upon the further condition, as theretofore, of his also being in actual possession.

The Welch title, overlapping by these 172 acres in controversy the Banks patent, was forfeited and sold in June, 1842, 14 days after this last-named act went into effect, by the commissioner of delinquent and forfeited lands, and the defendants now claim that by the provisions of this act their junior grant of 1822, embracing this 172 acres, became the senior one and gives them the right to the land. Whether or not it does depends upon whether from 1822 to 1842 their alienors had paid all taxes "charged or chargeable" upon the 600 acres embraced in the Banks grant.

[1, 2] It seems clear to us that, in order to defeat the commonwealth's right to retake and sell the land embraced in the senior forfeited grant and to regrant the same to a new purchaser in good faith, the obligation is upon those holding under the junior grant to show strict compliance with the requirements of this act of 1842, before they can claim that the senior grant has been transferred and vested

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in them. This they have failed to do. The evidence shows that, although this junior grant was dated July 2, 1822, no assessment of taxes, nor payment of taxes chargeable thereon, were made on the 600 acres until 1825. Such taxes were, under the tax laws of Virginia then existing, clearly due and payable for the years 1823 and 1824, and there can be no question from the evidence that such taxes were not paid. It would seem from the evidence further that the taxes on the land were not paid for the years 1832 and 1833. Certain it is that taxes were assessed for those years and the land returned delinquent for nonpayment, and no redemption is shown. However, it may be assumed from the fact that no sale for delinquency was made, and the grantees of the land have since continued payment, that such question as to those two years would have been one of fact for the jury, and therefore we put aside all further consideration of that matter. The failure to pay all taxes for each and every year by the junior grantee was imperative to give him the benefit of the act of 1842. He failed to pay for the two years of 1822 and 1823, and therefore the right to plead the benefit of this act never has accrued to him or his alienees, and the Welch title, sold and regranted by the commonwealth by and through Beckley, the commissioner of delinquent and forfeited lands, to the alienors of plaintiffs, must be held to be the senior and superior title. It also appears that the plaintiffs' predecessors on title obtained a deed from Beckley, commissioner of forfeited and delinquent lands, in 1843, and taxes have since been paid under this title. For five years after 1875, on behalf of the defendants, only an undivided half interest in the entire tract claimed was assessed as 178 acres. The failure to have assessed and to pay the taxes on the remainder of this undivided interest produced a forfeiture of all, and this forfeiture inured to the benefit of the plaintiffs paying the taxes on all and holding a conveyance from the state through Beckley, commissioner. Smith, trustee, v. Tharp, 17 W. Va. 221; Toothman v. Courtney, 62 W. Va. 167, 58 S. E. 915, 921; Rowland Land Co. v. Barrett, 70 W. Va. 704, 75 S. E. 57; Lawson v. Pocahontas, etc., Co., 73 W. Va. 296, 81 S. E. 583; Caretta Ry. Co. v. Fisher, 74 W. Va. 115, 81 S. E. 710; Ewart v. Squire, 239 Fed. 34, 152 C. C. A. 84, decided by this court December 2, 1916.

[3, 4] As regards the action of the court below, sustaining the demurrer to the plea in abatement the assignment of error in relation thereto does not seem to be insisted upon by counsel for defendants, and rightly so. The cases of Gordon v. Gilfoil, 99 U. S. 168, 178, 25 L. Ed. 383, and Risher v. Wheeling Roofing & Cornice Co., 57 W. Va. 149, 156, 49 S. E. 1016, 1019, very clearly established the two propositions:

(a) "That the pendency of a suit in a state court is no ground * * * for a plea in abatement to a suit upon the same matter in a federal court;" and (b) "that two causes, one at law and one in equity, are ex necessitate so dissimilar that the pendency of one cannot be pleaded in abatement of the other."

We see no error in the action of the court below in directing the verdict for the plaintiffs, and its judgment in this case must be affirmed.

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(244 Fed. 397)

BARRETT v. VIRGINIAN RY. CO.

(Circuit Court of Appeals, Fourth Circuit. July 5, 1917.)

No. 1521.

1. MASTER AND SERVANT ⟹125(1)—INJURIES TO SERVANT—DEFECTIVE APPLIANCES—KNOWLEDGE OF MASTER.
   A master does not insure that appliances are in a safe and suitable condition, and to entitle a servant to recover for personal injuries, it must appear that the master had actual or constructive knowledge of the defect alleged to have caused the injury.

2. MASTER AND SERVANT ⟹278(14)—INJURY TO SERVANT—KNOWLEDGE OF MASTER—EVIDENCE—SUFFICIENCY.
   In an action for injuries alleged to have been caused by the defective steps of an engine which plaintiff, as foreman of defendant's roundhouse, was required to repair, evidence *held* insufficient to show that the defendant had either actual or constructive notice of the defect.

3. WITNESSES ⟹397—IMPEACHMENT—CONTRADICTORY STATEMENTS—SUBSTANTIVE TESTIMONY.
   Testimony of prior statements introduced to contradict the foreman could only be considered for that purpose, and was in no sense substantive evidence.

4. MASTER AND SERVANT ⟹265(13)—ASSUMPTION OF RISK—PATENT DEFECTS.
   If the defective condition of the step of an engine was so patent as to be readily observed by every one, and plaintiff before he was injured made three trips over the step, he would be deemed to have assumed the risk incident to his employment.

5. DISMISSAL AND NONSUIT ⟹30—VOLUNTARY NONSUIT—MOTION—TIME.
   Plaintiff was not as a matter of right entitled to a voluntary nonsuit after the court had decided to direct a verdict for defendant, as a plaintiff should elect whether to take a nonsuit at the time of the making of a motion for a directed verdict.

In Error to the District Court of the United States for the Western District of Virginia, at Roanoke; Henry Clay McDowell, Judge.

Suit by S. D. Barrett against the Virginian Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

W. L. Welborn, of Roanoke, Va. (Welborn & Jamison and John G. Challice, all of Roanoke, Va., on the brief), for plaintiff in error.

H. T. Hall, of Roanoke, Va., and G. A. Wingfield, of Norfolk, Va. (Hall & Apperson, of Roanoke, Va., on the brief), for defendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. This is a suit instituted by plaintiff in error, plaintiff below, in the District Court of the United States for the Western District of Virginia, to recover damages on account of injuries sustained by plaintiff, who was the foreman of the roundhouse, while attempting to clean out a sand pipe which was stopped up. Plaintiff was employed by the defendant as a machinist at Elmore, W. Va., at which a roundhouse is maintained where engines are stored and certain repairs are made.

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Among other things, plaintiff, by virtue of his employment, was required to repair engines and other rolling stock at that point. The engine upon which plaintiff was working at the time he sustained the injury was being used and had been used for some time, in pusher and helper service. This particular engine had been placed upon what is known as the "ready track" to be employed in taking a train out of Elmore. After being placed, the engineer in charge discovered that the sand pipe was stopped up, and plaintiff was requested to clean it out. In order to perform this service it was necessary for the plaintiff to climb upon the engine. In front of the engine there were steps leading from the ground up over the pilot to the running board. In performing this service plaintiff made several trips up on the engine, and while coming down on the last trip he slipped and fell and sustained the injury upon which this action is based.

Plaintiff says that shortly after he had fallen and had been removed by other employés to a point several feet in front of the engine he looked at the engine and remarked that the step from which he slipped and fell was slanting from one to one and a half inches forward. However, there was no evidence offered tending to corroborate this statement by the other employés who were present. The other employés present testified that they did not observe that the step was slanting or that there was anything wrong with it. In addition to the plaintiff's testimony plaintiff introduced two other witnesses who said that they examined this step a month or two after the accident, and that it was slanting forward; the front portion of the step being from one to two inches lower than the rear portion.

Both the day and night foreman of the roundhouse at Elmore, who had charge of keeping the engine in repair, testified that they never knew there was anything wrong with the step. The engineer who had been running the engine and the hostler who had charge of it in the roundhouse also testified that they had no knowledge of any defect in the step. There was no evidence produced by the plaintiff to show how the alleged defect in the step was caused or how long it had been in that condition.

When all of the evidence had been introduced, the defendant moved the court to direct the jury to return a verdict in favor of the defendant. This motion was opposed by the counsel for the plaintiff, and after the motion was fully argued the court took the same under advisement from Saturday afternoon until Monday morning. When the court convened Monday morning the judge rendered an opinion in writing, which is made a part of the record, sustaining the defendant's motion to direct a verdict. After the court had rendered its decision, the plaintiff asked to be permitted to take a voluntary nonsuit. The court refused to grant plaintiff's request, and directed the jury to return a verdict in favor of the defendant, and judgment was entered accordingly. The plaintiff excepted, and the case now comes here on a writ of error.

[1] Only two points are involved in this controversy: First, as to whether the court below erred in directing a verdict in favor of the defendant; second, as to whether the court erred in refusing to permit

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the plaintiff to take a nonsuit. It is earnestly contended by counsel that plaintiff's injury was due to the failure of the defendant to provide a safe and suitable place in which plaintiff was required to work at the time he was injured; in other words, it is insisted that the step on the engine was carelessly and negligently constructed, and that this was the proximate cause of plaintiff's injury. While it is well settled that the master must exercise ordinary care in providing for the use of servants reasonably safe, sound, and suitable machinery and appliances, and also to use ordinary care to discover and repair defects, the master does not insure or guarantee that the machinery or appliances are in a safe and suitable condition, and where defects exist the master is not held to be guilty of negligence unless it appears that he knew, or by the exercise of ordinary care could have known, that such machinery and appliances had become defective and were in an unsafe condition. In other words, it must appear, in order to entitle the plaintiff to recover, that the master had either actual or constructive notice of the defect alleged to have caused the injury, and these facts must be established by legal evidence. Washington, etc., Railway Co. v. McDade, 135 U. S. 554, 10 Sup. Ct. 1044, 34 L. Ed. 235; Norfolk & Western Ry. Co. v. Reed, 167 Fed. 16, 92 C. C. A. 478; Virginia, etc., Wheel Co. v. Chalkley, 98 Va. 62, 34 S. E. 976.

[2] There are no facts or circumstances from which the jury could have inferred that the master had either actual or constructive notice of the alleged defective condition of the step. To entitle the plaintiff to recover, the burden is upon him to either show that defendant had actual or constructive notice.

In determining this point, it should be borne in mind that no witness testified that this step was defective before the accident occurred. Indeed, the first evidence we have of the existence of the alleged defective step is the testimony of the plaintiff, who says that he did not discover it until after he had been injured. From the nature of things, the respective engineers, firemen, and other employés who had from time to time had charge of this engine would have observed as glaring a defect as the one described by the plaintiff; therefore, if the step was defective in any respect, it appears that the defendant company could not have had either actual or constructive knowledge of the same prior to the time plaintiff was injured. It further appears that no one ever fell from the step or was injured in any way on account of its condition.

Counsel for plaintiff insists that the defective condition of the step was in plain view, and could have been seen even by casual observation, and, further, if the foreman had exercised even ordinary care as to the condition of the engine, he could have discovered the same. It appears from the testimony of plaintiff that the accident occurred when he was returning from the third trip to the point where he was working on the engine, and it further appears that he used this step each trip. If the defect was so obvious and easily discovered the plaintiff would undoubtedly have observed it, but, as we have stated, he testified positively that he never discovered that anything was wrong

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with the step until after he had fallen to the ground, and then observed it.

[3] The plaintiff in rebuttal, among other things, testified that Bondurant, the foreman, told him that he had previously fallen off of the same step, injuring his leg in the same way. The foreman testified positively that he never knew anything about the defect, and that he never told plaintiff that he had fallen from the engine on account of the defective condition of the step and injured his leg. Plaintiff also introduced a witness by the name of Cook, in rebuttal, who testified that Bondurant had told him that he had fallen off of the same step and injured his leg prior to the time plaintiff sustained his injury. The testimony of this witness was introduced for the purpose of contradicting the foreman, who had been asked on cross-examination if he had not been injured prior to the time the plaintiff was hurt by slipping from the engine on account of the defective condition of the step. This testimony could only be considered for the purpose of contradicting and discrediting Bondurant as a witness, and was in no sense substantive evidence from which it could be inferred that the step was in a defective condition anterior to the time of the accident in question. This rule is so well settled that we do not deem it necessary to cite any authority in support of the same.

[4] If, as contended by the plaintiff, the defective condition of the step was so patent as to be readily observed by every one, and it appearing as it does that the plaintiff before he was injured made three trips, each time using this particular step, then he would be deemed to have assumed the risk incident to his employment; the rule being that if he knew, or by the exercise of ordinary care, could have known of the defective condition of the step, he would not be entitled to recover.

[5] The second question involves the point as to whether the plaintiff was entitled, as a matter of right, to take a voluntary nonsuit after the court had decided to direct a verdict for the defendant.

This court in the case of Parks v. Southern Railway Co., 143 Fed. 276, 74 C. C. A. 414, in discussing this phase of the question, says:

> "At common law the action of the court upon a motion for a nonsuit was not a discretionary one, but the plaintiff, as of right, could at any time before verdict exercise this privilege; and this is now substantially the rule in North Carolina. But the more reasonable practice, certainly so far as the federal courts are concerned, is that the plaintiff has the right to take a nonsuit at any time before the case has been submitted to the judge or jury for determination. The plaintiff upon the making of a motion to instruct a verdict against him, that being one of the methods in the federal court of finally disposing of the cause, should then elect whether or not he will take a nonsuit, and not submit his cause upon a full hearing of that motion to the court, and take chances of an adverse decision thereon."

In view of what we have already said as respects this point, we do not deem it necessary to enter into a further discussion of the same, feeling as we do that the plaintiff was not taken by surprise, and that he was not deprived of introducing any newly discovered evidence before the case was submitted to the court for its final determination.

For the reasons stated, the judgment of the lower court is affirmed.

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(244 Fed. 401)

ANGLE v. BANKERS' SURETY CO.

(Circuit Court of Appeals, Second Circuit. July 2, 1917.)

No. 198.

1. BANKRUPTCY ⟹303(1)—PREFERENTIAL TRANSFERS—BURDEN OF PROOF.
In a suit by the trustee in bankruptcy to set aside a mortgage deed given by the bankrupt to a surety company to secure repayment of a sum of money which the surety agreed to advance to a construction company to be applied on specified contracts, and also to indemnify the surety company against loss as surety on such contract, where it appeared that the surety company made the advances and that they were never repaid by the bankrupt, the bankrupt's trustee has the burden of showing repayment by the construction company.

2. BANKRUPTCY ⟹160—PREFERENCES—WHAT ARE.
The execution of a mortgage by one not shown to then be insolvent, to indemnify surety company which became surety on the bond of a construction company, cannot, the transaction being a future one, be treated as preferential, the contract not then being deemed preferential.

3. BANKRUPTCY ⟹181—FRAUDULENT TRANSFER—CONSIDERATION.
Where the bankrupt executed a mortgage deed to induce defendant to make advances to a construction company, a misapplication of the advances by an official of the company, with the consent of the bankrupt, furnishes no ground to avoid the mortgage.

4. CORPORATIONS ⟹387(1)—CONVEYANCES—RIGHT TO OBJECT.
Where a construction company conveyed its plant to its surety, one who had given a mortgage to the surety to indemnify it for liability cannot object that the conveyance was ultra vires, only the company being entitled to make that objection.

5. BANKRUPTCY ⟹303(3)—FRAUDULENT CONVEYANCES—EVIDENCE.
In a suit by the trustee of a bankrupt, who executed a mortgage to secure the repayment of advances by defendant to a construction company, and also to indemnify defendant against loss on the construction company's bond, to set aside the mortgage on the ground that the advances had been repaid, evidence *held* insufficient to establish that the advances had been repaid by the construction company or that the conveyance was in fraud of creditors.

6. BANKRUPTCY ⟹184(2)—CHATTEL MORTGAGES—WHAT ARE.
An agreement between a construction company and its surety, that upon the company's default title to its plant should vest in the surety company, which was required to complete the work, is not a chattel mortgage, and so is not void under Bankruptcy Act July 1, 1898, c. 541, § 67a, 30 Stat. 564 (Comp. St. 1916, § 9651), because not recorded as required by state laws.

7. BANKRUPTCY ⟹172—TRUSTEES—RIGHTS OF.
In a suit by the trustee of a bankrupt, who executed a mortgage to secure defendant for advances to a construction company and to indemnify it as surety on the company's bond, where the plant of the construction company which defaulted had been transferred to defendant in accordance with the contract between it and defendant, the surety of the bankrupt company cannot attack the transfer of the plant as one made to hinder, delay, and defraud the construction company's creditors, that right inhering only in the trustee in bankruptcy of the construction company.

Appeal from the District Court of the United States for the Northern District of New York.

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Suit by Edwin C. Angle (now Gerardus Smith), as trustee in bankruptcy of the estate of Edward F. Garling, against the Bankers' Surety Company. From a decree for plaintiff, defendant appeals. Reversed.

See, also, 210 Fed. 289.

Daniel Naylon, Jr., and John D. Miller, both of Schenectady, N. Y., for plaintiff.

Joseph A. Murphy, of Albany, N. Y., for defendant.

Before COXE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. This is an appeal by the defendant in a suit brought by the trustee in bankruptcy of Edward F. Garling to set aside a deed executed by him and his wife in the form of a mortgage, and delivered to the Bankers' Surety Company to secure the repayment by Garling of the sum of $13,000 which the Bankers' Company agreed, at his request, to advance to the Mohawk Engineering & Construction Company to be applied by it on account of two specified contracts, and also to indemnify the Bankers' Company against any loss to it as surety upon the said contract.

The Mohawk Company's contracts in question were, one with the village of Matteawan for grading and paving, and the other a subcontract for work on the State Barge Canal, for the state of New York. The Bankers' Company was surety in the sum of $15,000 for performance of the Matteawan contract, and for $13,000 for the performance of the Barge Canal contract, having Garling, who was a stockholder, director, and treasurer of the Mohawk Company, as its indemnitor in each case.

The mortgage was dated August 2, 1910, and a petition in bankruptcy was filed against Garling November 29th, within four months thereafter.

The bill goes on three grounds: First, that Garling was insolvent and intended to prefer the Bankers' Company, which had reasonable cause to believe that a preference would be effected. Section 60 of the Bankruptcy Act (Comp. St. 1916, § 9644). Second, that the Bankers' Company had been repaid by the Mohawk Company the $13,000 advanced by it. Third, that the conveyance was made to delay, hinder, and defraud Garling's creditors, and was therefore void under section 67 of the Bankruptcy Act.

[1] The Bankers' Company did advance to the Mohawk Company $13,000 to be applied on the two contracts, and Garling personally never repaid any of it. The question is whether the Mohawk Company did. The burden of proof is on the complainant.

[2-5] The District Judge found that there was no evidence that Garling was insolvent August 2, 1910, or that he intended to prefer the Bankers' Company, or that the Bankers' Company had reasonable cause to believe that a preference would be effected, or that there was any fraudulent intent upon the part of any one in connection with the transaction. The mortgage was given not for a past, but for a present and future, consideration, and all parties regarded the contracts as profitable.

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The Mohawk Company abandoned both these contracts, and the Bankers' Company, in accordance with the suretyship agreement, took over the Matteawan contract in October, 1910, its engineer Paul taking charge October 11th, completing it October 27th, and paying to the Bankers' Company what he testifies was the profit, $1,598.67. It also took over the Barge Canal contract in October, 1910, and completed it at a loss of over $200,000.

The District Judge found that there was no liability on Garling's part as indemnitor to the Bankers' Company on either bond, the Matteawan contract having been completed at a profit, and his liability as indemnitor in connection with the Barge Canal contract having been discharged as follows: The American Pipe & Construction Company had contracted with the state of New York for part of the work on the State Barge Canal and one Warner had subcontracted with the Pipe Company to perform this work. The Bankers' Company was surety to the Pipe Company in the sum of $20,000 for Warner's faithful performance of his contract, and he had indemnified the Bankers' Company against any loss. The Mohawk Company had subcontracted with Warner to do this same work, and the Bankers' Company was surety to Warner in the sum of $13,000 for its faithful performance, Garling and the Mohawk Company indemnifying the Bankers' Company. The Mohawk Company and then Warner abandoned the work. Warner, October 18, 1910, surrendered and canceled the bond of the Bankers' Company of $13,000 to him on the Mohawk Company's contract, and the Bankers' Company released him from his agreement to indemnify it in connection with his bond of $20,000 to the Pipe Company.

The District Judge found that the Bankers' Company was, by this arrangement, discharged of its liability as surety for the performance of the Barge Canal contract by the Mohawk Company, so that no claim survived against Garling. As a result he found, and we entirely concur with him, that the mortgage was a valid and subsisting lien for the $13,000, less the profit of $1,598.67 received from the Matteawan contract.

The District Judge disposed incidentally of another of the complainant's contentions. One Ryan was appointed by the Mohawk Company its attorney in fact to receive the advances to be made by the Bankers' Company to the amount of $13,000 and apply the same to the Matteawan and State Barge Canal contracts. Notwithstanding this, Ryan applied $2,500 out of the first advance of $3,000, with Garling's consent, to a different contract, viz. the Mohawk Company's Road Contract No. 5,028. This loan does not seem to have been returned, but the District Judge rightly held that even so, the Bankers' Company would not be responsible for the diversion, and that neither Garling, who consented to it, nor his trustee in bankruptcy, had any standing to complain.

Upon the petition of the trustee the case was reopened to let in proof that the Bankers' Company had received personal property subsequently valued by the special master at $10,655.28, which should be credited on account of Garling's mortgage debt. The claim comes about as follows: The Mohawk Company had a third contract with the state

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known as Road Contract No. 5,028, for the performance of which the Bankers' Company was surety in the sum of $31,500. October 7, 1910, the Mohawk Company, having abandoned this contract, adopted a resolution to transfer all its plant in connection therewith at values to be appraised, in consideration of the payment by the Bankers' Company of the Mohawk Company's indebtedness outstanding on the contract, amounting to over $17,000, and of completing the contract without loss to it.

The transfer was in accordance with the contract of suretyship between the two companies, which contained the following provision:

"The undersigned further agrees that upon notice to, or discovery by, the company of any failure to comply with any provision of the contract for the completion of which the company has given its bonds, immediately upon said notice or discovery the right of possession of such plant as it may own or have upon said work shall vest in the company, so that the company may use same in the prosecution of said contract to completion."

We assume that the Mohawk Company was insolvent at the time, and that the Bankers' Company knew it.

A previous resolution had been prepared transferring the contract and plant to one Consalus, which was intended to be adopted at a meeting of the board called for October 6, 1910. Consalus in the meantime withdrew his offer, no meeting was held October 6th, and the resolution was never passed. October 7th, two of the three directors of the Mohawk Company being present, the above resolution transferring the contract and plant to the Bankers' Company was adopted. The complainant treats this as unauthorized and ultra vires, apparently because different from the resolution first drawn. However, the only person, if any, entitled to object was the Mohawk Company, which never did, but, on the contrary, ratified by making a formal assignment of the contract and plant to the Bankers' Company October 17, 1910, and its trustee in bankruptcy has never raised the question of ultra vires.

The special master charged the Bankers' Company with the value of this plant on the ground that it was a transfer without consideration and a preference under section 60 of the Bankruptcy Act, as well as under section 66 of the Stock Corporation Law of New York (Consol. Laws, c. 59), the material part of the latter being:

"(66) * * * No conveyance, assignment or transfer of any property of any such corporation by it or by any officer, director or stockholder thereof, nor any payment made, judgment suffered, lien created or security given by it or by any officer, director or stockholder when the corporation is insolvent or its insolvency is imminent, with the intent of giving a preference to any particular creditor over other creditors of the corporation, shall be valid, except that laborers' wages for services shall be preferred claims and be entitled to payment before any other creditors out of the corporation assets in excess of valid prior liens or incumbrances."

The Mohawk Company was adjudicated a bankrupt January 28, 1911, and its trustee brought suit in the state court of New York against the Bankers' Company, October 11, 1911, before the present suit was begun, April 24, 1912, to avoid the transfer as a preference, under section 60 of the Bankruptcy Act, within four months of the filing of the petition. This suit is still pending, and the question must

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be disposed of in it. The trustee in bankruptcy of the Mohawk Company is the only person authorized to act in the premises.

At all events, we think the Bankers' Company paid for the plant by paying the Mohawk Company's outstanding liabilities in connection with it to a much larger amount and by completng the contract without loss to the Mohawk Company. The transfer was not in consideration of a prior indebtedness nor out of the regular course of business, as were the transfers by the corporations in the cases relied upon by the complainant. Cole v. M. I. Co., 133 N. Y. 164, 30 N. E. 847, 28 Am. St. Rep. 615; Hurd v. Laundry Co., 167 N. Y. 89, 60 N. E. 327. In them the corporation transferred all its assets to a new company, substituting a new defendant for the creditors. The transfer in this case was in pursuance of a very reasonable and usual provision of such contracts, viz. that if the contractor failed to complete the contract the surety might do so, and to that end be given either the possession or title to the plant existing at the time of the contractor's default. We discover no evidence whatever of an intent on the part of the Mohawk Company to prefer the Bankers' Company or any reasonable ground for the latter to believe that a preference would be effected. Indeed, if any preference were effected, it would be not to the Bankers' Company, but to the creditors whose claim that company paid, and who had no knowledge of the transaction whatever. The object of both parties was entirely different, viz. to complete the contract without loss.

The special master also charged the Bankers' Company with checks aggregating $5,976.34 received from the Fishkill Electric Railway Company. It is not made plain that these were payments on account of the Matteawan contract. At all events, the mere receipt by the Bankers' Company of moneys from that contract or from the Barge Canal contract does not show that the moneys were paid on account of the advance of $13,000 guaranteed by Garling. As the Bankers' Company lost over $200,000 on the Barge Canal contract, it might have received a great many checks to be applied to other purposes than to payment of this particular advance of $13,000, guaranteed by Garling. The parties not having made any application of the payments, the court should apply them to the Bankers' Company's unsecured claims in the first instance. In this way the Bankers' Company was brought in debt to the Mohawk Company, and the District Judge, confirming the report of the special master, entered a decree that the mortgage be canceled and discharged of record.

[6, 7] The defendant thereupon moved that the decree be vacated and the case reopened to permit it to offer testimony which it had failed to offer before the special master because of some misunderstanding as to the time of the closing of the case. This motion was granted. The special master then added a new charge against the Bankers' Company. He calculated the amount unpaid by the state under the Barge Canal contract at the time the Bankers' Company took it over at $9,643.54, which he held the company got for nothing; that the transfer was made without consideration and in fraud of the Mohawk Company's creditors under section 67e; that the agreement that the title to the plant should vest in the Surety Company upon the Mohawk Company's default was a chattel mortgage, and void under 67a,

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because not recorded as required by section 230 of the New York Lien Law (Consol. Laws, c. 33). He cited, in support of this latter view, Title Guaranty Co. v. Witmire, 195 Fed. 41, 115 C. C. A. 43, and Massachusetts Bonding Co. v. Kempner, 220 Fed. 847, 136 C. C. A. 593. In those cases there was a present assignment of title to things not in existence, whereas in this case the agreement was that upon the contractor's default possession of the plant then existing should vest in the surety, and the assignment actually made was a present one. It is impossible to regard this provision as being a chattel mortgage. The other objection that the transfer was made to hinder, delay, and defraud the Mohawk Company's creditors is available to its trustee in bankruptcy and not to Garling's trustee. The District Judge affirmed the report of the special master, and, the Bankers' Company being found to be still more overpaid, entered a final decree ordering that the mortgage on Garling's property should be canceled, from which this appeal is taken.

We discover no evidence of any intent on the part of the Mohawk Company, in transferring this contract and plant to the Bankers' Company, to delay, hinder, or defraud its creditors. The transaction seems to us perfectly natural and in accordance with the terms of the suretyship agreement made between the parties. The Mohawk Company desired the contract to be completed without loss to itself. The Bankers' Company has completed it at a great loss, and has increased the Mohawk Company's estate by paying off indebtedness for which it would be liable and by relieving it of any claim by Warner for nonperformance. We are of opinion that the conclusion originally arrived at by the District Judge was right, and that the decree should be that the mortgage is a good and valid security to secure the sum of $13,000 advanced by the defendant with interest, less $1,598.67 received by it with interest, and that, upon payment of this sum within a time to be fixed by the District Court, the mortgage be discharged of record, in default whereof the bill be dismissed, with costs.

Decree reversed.

(244 Fed. 406)

GREAT NORTHERN RY. CO. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. June 25, 1917.)

No. 2836.

1. COMMERCE ⟹5—CONSTITUTIONAL LAW ⟹301—SAFETY APPLIANCE ACTS—VALIDITY.

Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531, as amended by Act April 1, 1896, c. 87, 29 Stat. 85, Act March 2, 1903, c. 976, 32 Stat. 943 (Comp. St. 1916, §§ 8605–8615), and Act April 14, 1910, c. 160, 36 Stat. 298, being fairly within the scope of a regulation of commerce among the states, its validity is not impaired by the due process clause of the Fifth Amendment to the Constitution.

2. PLEADING ⟹127(2)—ADMISSIONS—CONSTRUCTION OF PLEADING.

In an action against a railway company for violations of the Safety Appliance Acts, in which the complaint alleged that the railway company ran its trains in interstate commerce when the speed of the trains was controlled by brakemen using the common hand brake, and when brake-

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men were required to use such brake to control the speed of the train, and when the speed of the train was not controlled by power or train brakes used and operated by the engineer, an answer alleging that each engine was equipped with a powerful driving wheel brake and appliances for operating the train brake system, and that in each train not less than 85 per cent. of the cars were equipped with power or train brakes, which were operated by the engineer of the locomotive to control the speed of the train in connection with the hand brakes, did not deny, but, on the contrary, admitted, that the speed was to some extent controlled by brakemen using hand brakes, and was insufficient.

3. PLEADING ⟹8(6)—CONCLUSIONS—DENIAL OF VIOLATION OF LAW.

In a suit against a railway company for penalties for violations of the Safety Appliance Acts, a specific denial that the statute was violated by defendant was but a conclusion of the pleader, to be disregarded where the specific averments of the answer did not deny the material averments of the complaint.

4. RAILROADS ⟹229—EQUIPMENT OF TRAINS—BRAKES.

The Safety Appliance Acts are mandatory in requiring that trains must not only be equipped to run, but must actually be run, without requiring brakemen to use the hand brakes in the ordinary movement of the trains.

Ross, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Northern Division of the Eastern District of Washington; Frank H. Rudkin, Judge.

Suit for penalties by the United States against the Great Northern Railway Company. Judgment for the United States, and defendant brings error. Affirmed.

Charles S. Albert and Thomas Balmer, both of Spokane, Wash., for plaintiff in error.

Francis A. Garrecht, U. S. Atty., of Spokane, Wash., and Philip J. Doherty, Sp. Asst. U. S. Atty., of Washington, D. C.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. This case for a second time comes before the court. It is a prosecution in 12 counts, brought to recover penalties against the railway company for violation of Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531, as amended by Act April 1, 1896, c. 87, 29 Stat. 85, Act March 2, 1903, c. 976, 32 Stat. 943, and Act April 14, 1910, 36 Stat. 298. Examination of the case as reported in U. S. v. Great Northern R. Co., 229 Fed. 927, 144 C. C. A. 209, and of the complaint herein, shows that the material allegations of the complaint are that the railway company ran its trains in interstate commerce when the speed of the train was controlled by the brakemen using the common hand brake for that purpose, and when the railway company required the brakemen to use the common hand brake to control the speed of the train, and when the speed of the train was not controlled by the power or train brakes used and operated by the engineer of the locomotive drawing the train.

Upon the first hearing before the District Court, demurrer to the complaint was sustained, and judgment went in favor of the railway

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company. But this court reversed that judgment, and after remand the company answered in material part as follows:

"Said defendant further alleges that each engine upon each of said trains was equipped with a powerful driving wheel brake and appliances for operating the train brake system, and that in each train not less than 85 per cent. of the cars therein were equipped with power or train brakes, which were used and operated by the engineer of the locomotive drawing such train, to control its speed in connection with the hand brakes. Said defendant specifically denies that the act of Congress mentioned in the complaint herein as amended was violated by the said defendant," etc.

The United States by its counsel moved for judgment on the pleadings and against objection by the railroad company the motion was granted. The railway company contends that to allow recovery would be to deprive it of its property without due process of law, and would be violative of article 5 and section 1 of article 14 of the Amendments to the Constitution.

[1] We cannot sustain this view. The obvious purpose of the statute being to protect men employed upon trains in the movement of interstate commerce, the power of Congress may be fully exerted in the premises, and, the statute being fairly within the scope of the regulation of commerce among the states, in our opinion its validity is not impaired by the due process clause of the Fifth Amendment to the Constitution. Southern Railway Co. v. United States, 222 U. S. 20, 32 Sup. Ct. 2, 56 L. Ed. 72; Second Employers' Liability Cases, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44.

[2, 3] It is said that the court erred in granting judgment upon the pleadings because the allegations of the complaint are denied, and the averments of facts embodied in the portion of the answer as heretofore quoted must be construed most favorably to the defendant. The argument made on this point would have us conclude that the sole effect of the answer interposed is that the train was properly equipped with power driving wheel brakes and appliances, and that at least 85 per cent. of the cars were equipped with power or train brakes; that these were used and operated by the engineers to control the speed of the trains in connection with the hand brakes; that there is no admission in the pleading that brakemen were employed upon the top of the cars or that brakemen were required to use the hand brakes to control the speed of the train; and that, for all that appears, the brakes may have been set before the cars were moved.

The error of this reasoning is apparent when we separate the averments of the complaint and answer and test those of the answer. Thus, there is an averment that the train was run when its speed was controlled by brakemen using the common hand brake for the purpose of controlling the speed. There is no attempt at denial of this allegation, except by averment that the engine was equipped with appliances for operating a train brake system, and that the cars in the train were equipped with power or train brakes, which were operated by the engineer of the locomotive drawing such train to control its speed in connection with the hand brakes. This, however, is but an admission that the speed was to an extent controlled by the brakemen using hand brakes for the purpose. Obviously, allegation of use of hand brakes

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by men to control the speed in connection with the power brakes used by the engineer is not a denial of the charge that there was control of speed by the use of the hand brakes, but is rather a plea seeking to avoid liability by pleading use of dual means of control, hand brakes and power brakes.

Again, the complaint alleges that defendant required the brakemen to use the common hand brake to control the speed when the speed was not controlled by the power brakes used by the engineer of the locomotive. To this specific allegation of a requirement of use of hand brakes there is no specific denial. Nor is there a denial that the use of hand brakes to control speed was required when the speed was not controlled by the power brakes operated by the engineer of the locomotive; but, as above indicated, we find merely affirmative allegations of lawful equipment, with plea of use and operation of the two methods of breaking, the one in connection with the other. Such an answer is weighty of admission that men were required to go, and did go, on tops of the cars and between them, to use hand brakes to control the speed of the train. The denial that the act of Congress mentioned in the complaint was violated by the railway company is but a conclusion of the pleader, to be disregarded if the antecedent specific averments of the answer were not denials of the material averments of plaintiff's complaint. We think it is now clear that close inspection of the pleadings has shown that the material allegations of the complaint stand undenied; wherefore if, by authority of the decision upon the former writ of error, nothing by way of affirmative matter constituting legal defense was set forth in the answer, judgment on the pleadings was properly given. We have, then, to ascertain what was the substantive question of law decided by this court upon the former review. Upon consideration of a complaint and stipulation of fact, which presented the same issue as there is now before the court, it was said:

"Second. The act by its terms expresses with sufficient certainty the intention of Congress that hand brakes shall not be used on freight trains in the ordinary movement of such trains in interstate commerce. By the act Congress adopted for freight trains the system of braking that was in use on passenger trains. It made no specific mention of the number of cars in a train that should be equipped with power brakes, but it enacted in general terms that the train should be sufficiently equipped to be run without requiring the use of the common hand brake. The clause 'without requiring brakemen to use the common hand brake,' as found in the first section of the act, is used in the same sense as the words 'without the necessity of men going between the ends of the cars,' in the second section, which provides for automatic couplers. The language of the act was equivalent to declaring that after the date named freight trains should not only be equipped to run, but should actually be run without requiring brakemen to use the common hand brake. No implication to the contrary is to be found in the provision in section 2 that all cars must be equipped with 'efficient hand brakes,' a provision which is ascribable to the necessity of controlling the movement of cars in yards and elsewhere, when trains have been broken up or are being made up. In an act, the express purpose of which is to relieve brakemen from the danger of using hand brakes, a provision that the train shall be so equipped as to run without requiring the use of hand brakes is a prohibition against the use of hand brakes in the ordinary movement of the trains. In view of the protection which was intended to be afforded by the act, it would have been idle for Congress to declare that freight trains must be equipped with appliances to operate a power brake system, and at the same time leave it

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optional with a railroad company to decide whether it would or would not operate its trains with that system. To say that [all] trains shall be provided with power brakes, and in the same breath to say that the carrier may refuse to use them, is to contradict the very purpose and terms of the act. Yet such is the effect of the law, if it be given the construction contended for by the defendant in error."

[4] The doctrine of the decision (the case has been followed by Judge Tuttle in the District Court in the Eastern District of Michigan in United States v. Grand Rapids & Indiana R. Co., 244 Fed. 609) is that the statute is mandatory in requiring that the trains must not only be equipped to run, but must actually be run without requiring brakemen to use the hand brakes in the ordinary movement of the trains. And as there is no contention that extraordinary circumstances or exigency of train movement enter into the case under consideration, the defendant company has advanced no firm ground for holding that it is excluded from the demands of the statute as it was interpreted upon the former writ of error.

The judgment is affirmed.

ROSS, Circuit Judge. I dissent, adhering, as I do, to the views expressed by me when the case was last under consideration here. 229 Fed. 927, 931.

(244 Fed. 410)

WONG CHUNG v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. August 20, 1917.)

No. 2930.

1. ALIENS ⟹32(2)—DEPORTATION OF CHINESE—TIME OF PROCEEDINGS.

Under the provision of Immigration Act Feb. 20, 1907, c. 1134, § 43, 34 Stat. 911 (Comp. St. 1916, § 4289), that the act "shall not be construed to repeal, alter or amend existing laws relating to the immigration or exclusion of Chinese persons," the provisions of sections 20 and 21 (Comp. St. 1916, §§ 4269, 4270), requiring proceedings for deportation to be taken within three years after entry, do not apply to Chinese persons, who may be deported at any time under Exclusion Act May 5, 1892, c. 60, 27 Stat. 25, as amended by Act Nov. 3, 1893, c. 14, 28 Stat. 7 (Comp. St. 1916, §§ 4315–4323).

2. ALIENS ⟹32(8)—PROCEEDINGS FOR DEPORTATION OF CHINESE—SUFFICIENCY OF EVIDENCE.

A finding by both the commissioner and District Court, which heard the witnesses, against the claim of a person of Chinese descent that he was born in the United States, *held* not so clearly erroneous as to warrant its reversal; the only witnesses in support of such claim being Chinese persons, and it appearing that defendant, although about 30 years old, could not speak the English language.

Appeal from the District Court of the United States for the Southern Division of the Southern District of California; Oscar A. Trippet, Judge.

Proceeding for deportation by the United States against Wong Chung. From an order of deportation, made by the District Court, defendant appeals. Affirmed.

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Duke Stone, of Los Angeles, Cal., for appellant.

Albert Schoonover, U. S. Atty., and Clyde R. Moody, Asst. U. S. Atty., both of Los Angeles, Cal.

Before GILBERT and HUNT, Circuit Judges, and DIETRICH, District Judge.

DIETRICH, District Judge. The appellant is a person of Chinese descent, who admittedly is in the United States without right, unless, as he claims, he was born in this country. Having been apprehended for deportation pursuant to the provisions of the Chinese Exclusion Acts (27 Stat. 25; 28 Stat. 7), the burden was upon him to establish his nativity "to the satisfaction" of a judge or commissioner. Section 3, Act May 5, 1892 (Comp. St. 1916, § 4317). The commissioner found against him, and upon appeal, after a trial de novo, the District Judge reached the same conclusion, and accordingly entered an order for his deportation. From this order he has appealed.

[1] It is first contended that the order is erroneous, for the reason that the deportation was not accomplished within three years from the date of the appellant's entry into the United States, and that therefore the proceedings are barred by the provisions of sections 20 and 21 of the General Immigration Act of February 20, 1907 (34 Stat. 898). But it is expressly provided in this act that it "shall not be construed to repeal, alter, or amend existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent," and it is well established that the government may proceed under either the special Chinese Exclusion Acts or the General Immigration Act within three years from the wrongful entry of the Chinese person, or under the special Exclusion Acts alone, if more than three years have elapsed since the entry. United States v. Wong You, 223 U. S. 67, 32 Sup. Ct. 195, 56 L. Ed. 354.

[2] The more serious contention is that it should have been found that the appellant is native-born, and is therefore not subject to deportation. We are not particularly advised of the views of the lower court, but presumably the finding was against the appellant upon this issue of fact.

The appellant's story is, in substance, that he was born in San Francisco; that he is about 30 years of age, and is unmarried; that when he was very young his parents left him with his clansmen, and soon thereafter died; that when still a child of from 5 to 10 years of age he was brought by an uncle from San Francisco to Los Angeles, where he was placed in charge of a Chinese woman, and a few years later he was taken into a restaurant as a helper, where he remained a while, but most of his life has been spent in laundry work. Both the Chinese woman and the keeper of the restaurant testified in his behalf. He produced no witness having knowledge of his birth, and the only evidence relative thereto consists of his statement of what his uncle and other clansmen told him. He is strongly corroborated by the woman who cared for him and the Chinese restaurant keeper touching his claim that his uncle took him to Los Angeles when he was a child, and that he has resided there for about 20 years. Moreover,

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it would seem to be quite incredible that the story he told to the inspector could have been fabricated upon the impulse of the moment, and before he had an opportunity to confer with friends or communicate with counsel.

Upon the other hand, it may be pointed out that there are some discrepancies and contradictions of a more or less serious character in his statements; that he produced no witness from Los Angeles, other than the two Chinese persons referred to, to establish his residence there; and that, notwithstanding his claim of birth and long residence in this country, he is apparently unable to understand or speak the English language. Were it conclusively shown that he has lived in Los Angeles since childhood, we would be inclined to give credence to the evidence touching the place of his birth, secondary though it may be, for the reason that direct evidence of the date and place of one's birth is frequently unavailable; but if the appellant has been in Los Angeles 20 years it should have been entirely possible for him to produce witnesses other than those of his own race. Furthermore, he should have explained why, if he was born in this country and has lived all of his life in a community like Los Angeles, he has not learned to speak the English language.

In view of these considerations, it is thought that we should not disturb a conclusion concurred in by both the commissioner and the District Judge. Chin Bak Kan v. United States, 186 U. S. 193, 22 Sup. Ct. 891, 46 L. Ed. 1121; Quock Ting v. United States, 140 U. S. 417, 11 Sup. Ct. 733, 35 L. Ed. 501; Gee Fook Sing v. United States, 49 Fed. 146, 1 C. C. A. 211.

Accordingly the order appealed from will be affirmed.

(244 Fed. 412)

STRATHLEVEN STEAMSHIP CO., Limited, v. BAULCH.

(Circuit Court of Appeals, Fourth Circuit. July 19, 1917.)

No. 1535.

1. NAVIGABLE WATERS ⟹23—OBSTRUCTION OF NAVIGATION—ANCHORAGE IN CHANNEL.

Whether the anchorage of a vessel in a navigable channel is in violation of Act March 3, 1899, c. 425, § 15, 30 Stat. 1152 (Comp. St. 1916, § 9920), which prohibits such anchorage "in such manner as to prevent or obstruct the passage of other vessels or craft," depends upon the facts of the particular case. If a vessel anchors at a point where other vessels navigated with care can safely pass her, she does not violate the statute, but if she occupies so much of the channel as to practically impede its navigation or make the effort to pass her a dangerous maneuver, she unlawfully obstructs it.

2. INDEMNITY ⟹14—CONCLUSIVENESS OF JUDGMENT AGAINST INDEMNITEE.

An adjudication that a vessel was in fault for a collision because of the place and manner of her anchorage is conclusive of such fact in a subsequent suit by the vessel against her pilot to charge him with responsibility therefor.

3. INDEMNITY ⟹14—CONCLUSIVENESS OF JUDGMENT AGAINST INDEMNITEE.

That a vessel in a suit for collision unsuccessfully contended that she was not in fault does not estop her from alleging such fault in a subsequent suit to charge her pilot with responsibility therefor.

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4. ADMIRALTY ⟹19—JURISDICTION—SUIT AGAINST PILOT.

A suit by a vessel against her pilot to charge him with responsibility for her anchorage in an unlawful place is within the admiralty jurisdiction.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk; Edmund Waddill, Jr., Judge.

Suit in admiralty by the Strathleven Steamship Company, Limited, owner of the steamship Strathleven, against William Baulch. Decree for respondent, and libelant appeals. Reversed.

Floyd Hughes, of Norfolk, Va. (Hughes & Vandeventer, of Norfolk, Va., and Ralph James M. Bullowa, of New York City, on the brief), for appellant.

Robert H. Talley, of Richmond, Va., for appellee.

Before KNAPP and WOODS, Circuit Judges, and DAYTON, District Judge.

KNAPP, Circuit Judge. The material facts are stated in the opinion of this court in the kindred case of The Strathleven, 213 Fed. 975, 130 C. C. A. 381. They appear in greater detail in the opinion of the District Court in that case, under the title of The Margaret J. Sanford (D. C.) 203 Fed. 331. The latter court found that the steamer Strathleven was solely at fault for the collision with a loaded scow which the tug Margaret J. Sanford had in tow, and accordingly dismissed the libel filed by the owner of the steamer against the tug. On appeal this court affirmed the finding that the steamer was at fault, but held that the tug was also at fault, and remanded the case, with directions "to modify the decree so as to adjudge both the Strathleven and the Sanford in fault and to provide that the damages and the costs below be divided equally between them."

[1] Such a decree having been entered, and in compliance therewith the owner of the tug having paid half the damages suffered by the Strathleven, this libel was filed to recover the other half from the pilot in charge of the steamer when the accident happened. The case was tried below on the testimony in the former suit with the added deposition of the master of the Strathleven to the effect that he had never before been in those waters, and that he depended entirely upon the pilot for the safe and proper anchoring of his vessel. The learned District Judge dismissed the libel upon the supposed authority of the decision of this court in the Strathleven Case, supra, which followed the earlier case of The Caldy, 153 Fed. 837, 83 C. C. A. 19, saying in his memorandum opinion:

> "Under this corrected interpretation of the law, the pilot clearly had the right to anchor the Strathleven where he did, and he should not be held liable for the collision which subsequently occurred, brought about from causes not the result of the anchorage selected by him."

We are clearly of opinion that this ruling misconceives the import of the two decisions mentioned, construing and applying the act of Congress of March 3, 1899, which provides, among other things:

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"That it shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such manner as to prevent or obstruct the passage of other vessels or craft."

In the Caldy Case, supra, it was said:

"We do not think the Congress intended by Act March 3, 1899, * * * to absolutely forbid anchoring in navigable waters, except only at such places as the location of the vessel would necessarily prevent the passage of other vessels, or obstruct them in passing to such an extent as to make the effort to do so a dangerous maneuver."

This language was repeated in the Strathleven Case, supra, with citation of The City of Birmingham, 138 Fed. 559, 71 C. C. A. 115, and The Europe, 190 Fed. 478, 111 C. C. A. 307, in which the same conclusions were reached. It follows from these decisions that the question whether the statute has been violated depends upon the facts of the particular case. If a vessel anchors at a point in a channel where, notwithstanding such anchorage, other vessels navigated with care can safely pass, she does not violate the statute or render herself liable under the general rules of navigation, although she obstructs the channel to a certain extent. On the other hand, if the anchored vessel occupies so much of the channel as to practically impede its navigation or make the effort to pass her a "dangerous maneuver," she has placed herself in a position which the statute forbids, and must take the consequences of her unlawful act. Each case must be judged by its own circumstances, and the decisions above cited are far from holding that appellee had the right as matter of law to anchor the Strathleven where and as he did. If in point of fact he anchored her "in such manner as to prevent or obstruct the passage of other vessels or craft," he violated the statute in so doing, to say nothing of the harbor regulations, and thereby made himself liable for the resulting collision.

Now, in the original Strathleven Case the trial court held, in an opinion which states and discusses the facts at length, that the steamer was solely responsible for the accident, and unquestionably the fault of the steamer was the fault of the pilot. This court, though holding that the tug was also to blame, fully affirmed for reasons stated the finding and conclusion that the steamer was at fault, and therefore in that case the question of her liability has been finally determined.

But this case was heard on the testimony in the former suit with a further statement by the master of the Strathleven, which certainly adds nothing of advantage to the appellee. The proofs relating to the negligence of the steamer are precisely the same in both cases. This court has passed upon those proofs and held that they show as matter of fact and law that the collision was caused, in part at least, by the fault of the Strathleven, that is, of her pilot, and no good reason now appears for reaching a different conclusion. On the contrary, a careful review of the testimony confirms the views expressed in our former opinion as to the liability of the steamer. The dismissal of the present libel is therefore without other support on the merits than the mistaken notion that this court had so construed the statute as to give appellee the legal right "to anchor the Srathleven where he did." The erroneous ruling resulted from this misconception.

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[2] Strictly speaking, the decision in the original case is not res adjudicata as to Baulch, as he was not a party to the proceeding, but it is res adjudicata as to the finding and conclusion of negligence in the matter of the place and manner of anchoring the steamer, for which the appellee was responsible, and his liability follows by operation of law. Burley v. Compagnie De Nav. Fran., 194 Fed. 335, 115 C. C. A. 199.

[3] To an extent at least the position now taken by the libelant is inconsistent with its claim in the former suit that the Strathleven was properly anchored and her pilot without fault for the collision with the tug. But that claim was not sustained by the trial court or by this court, both finding it contrary to the fact, and we deem it too plain for discussion that the case here presented comes within no recognized rule of estoppel. 16 Cyc. 769.

[4] The contention that admiralty has no jurisdiction in a case of this kind is scarcely debatable. It is refuted by high authority and by the fact of its frequent exercise without question. Sideracudi v. Mapes (D. C.) 3 Fed. 873; Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 34 Sup. Ct. 733, 58 L. Ed. 1208, 51 L. R. A. (N. S.) 1157.

The decree must be reversed, and the cause remanded for further proceedings in accordance with this opinion.

Reversed.

(244 Fed. 415)

THE ALICE.

THE ETNA.

(Circuit Court of Appeals, Fourth Circuit. July 5, 1917.)

No. 1518.

SALVAGE ⟹31 — RESCUE OF SHIP FROM DANGER OF FIRE — ADEQUACY OF AWARD.

A salvage award of $500 to one of two tugs, which together towed a steamship from her slip where she was lying without steam some 300 feet from a burning elevator, *held* not so inadequate as to warrant interference by an appellate court, where, while there was possible danger to the ship and the service was meritorious the danger was not great and the tugs incurred little, if any, risk.

Appeal from the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge.

Suit in admiralty by Sanford & Brooks Company, owner of the tug Alice, against the Navigazione Generale Italiana, owner of the steamship Etna. Decree for libelant, which appeals. Affirmed.

Daniel R. Randall, of Baltimore, Md. (R. E. Lee Marshall, of Baltimore, Md., on the brief), for appellant.

John B. Deming, of Baltimore, Md. (Whitelock, Deming & Kemp, of Baltimore, Md., on the brief), for appellee.

Before KNAPP and WOODS, Circuit Judges, and WADDILL, District Judge.

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KNAPP, Circuit Judge. The Sanford & Brooks Company, owner of the steam tug Alice, libeled the Italian steamship Etna for alleged salvage service, got a decree for $500 in the court below, and brings this appeal on the ground of the inadequacy of the award. The circumstances in general are these:

In the afternoon of June 13, 1916, a fire occurred in an elevator at the water end of a pier extending southerly into the Patapsco river, in the harbor of Baltimore. The elevator was destroyed and nearby shipping and other property damaged or put in danger. When the fire broke out two steamers, the Etna and the Bologna, were lying bow in on the further or westerly side of the next pier to the west. The width of this pier is 65 feet and the width of the intervening slip 122 feet. The stern of the Etna was about 450 feet from the water end of the pier, and about 365 feet diagonally from the center of the elevator. The Bologna, between the Etna and the stream, had steam up at the time, and moved out under her own power to a place of safety. The Etna had not fully completed her loading, was not under steam, and had a scow at her stern from which some portion of cargo was to be taken.

When the elevator was seen to be on fire, the Alice, which was a thousand feet or so away, went at once to lend assistance. She entered the slip where the Etna was berthed, but in going about had the ill luck to run aground. She got off quickly, however, and in a few minutes had lines from the steamer fastened to her bitts. About this time —just when is somewhat uncertain—the Curtis Bay, a much larger and more powerful tug, arrived at the slip, backed in towards the stern of the ship, made fast to her in some way with the scow between them, and she was then pulled out into the river, the scow going adrift.

So much seems fairly free from doubt, the rest is a tangle of conflict and dispute. The owners of both tugs promptly filed libels, each claiming the credit of a gallant rescue, and each eager to be handsomely rewarded. The trial of the consolidated cases disclosed a variety of contentions. Witnesses for the Alice pictured a brave exploit, amid bursting flames and other perils, which saved a steamer and cargo worth millions from impending destruction. For the Curtis Bay less emphasis was placed on the risk to herself in getting the Etna away, but there was no lack of testimony that she alone effected the escape; the Alice having hindered rather than helped the delivery. On the other hand, the officers of the Etna testified that she was never in any danger, because of her distance from the elevator and the fact that the wind was in the northwest; that there was some heat, but not enough to be really uncomfortable, and it was a hot day anyhow; moreover, that arrangements had been made the night before to have the steamer towed over to Locust Point, where the balance of her cargo was to be taken on; and that when the tugs approached that afternoon it was supposed they had come for that purpose, as otherwise they would not have been allowed to remove her.

In all this contradiction it is not easy to discern the truth or to reach a conclusion that satisfies the sense of justice. The event seems to show, thanks among other things to the presence of a powerful fire

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boat, that the Etna would probably not have been damaged if she had remained at her dock. But against this it cannot be denied that there was such possibility of injury, and perhaps serious injury, as to make her removal a matter of obvious prudence. The Alice was first on the scene, to be sure, but she met with a mishap in turning around, and so was not able, for some minutes at least, to give any help to the steamer. In the meantime, as nearly as we can make out, the Curtis Bay backed into the slip and rendered assistance that was prompt and effective. Neither tug took any considerable risk, and such damage as the Alice sustained was slight and unimportant. The service involved only ordinary effort and skill, and it was all over in something like half an hour.

Taking all the circumstances into account, we are not persuaded that the compensation allowed the Alice was so clearly inadequate as to warrant interference with the decree. True, as the case is here presented, the amount seems rather meager in comparison with the award of $1,000 to the Curtis Bay. But as that tug might be thought overpaid for what it did, the comparison plainly fails to show that the Alice was not paid enough. Each claim must stand on its own merits. The removal of the steamer was entirely proper and commendable, even if she were not in actual danger, but it was a salvage service of such low order as to be measured, not by value of ship or cargo, but rather by generous recognition of voluntary aid and generous allowance for the trouble and loss of time incurred by the rescuing tugs. On that basis, which we believe to be correct, the compensation awarded the Alice was not illiberal. Indeed, it appears ample in comparison with awards in other cases of the class to which this belongs, where the aided ship was not in imminent peril. The Rialto (D. C.) 15 Fed. 124; The John Swan (D. C.) 50 Fed. 447; The Dauntless (D. C.) 109 Fed. 912; The Fred E. Scammell (D. C.) 133 Fed. 608.

Affirmed.

(244 Fed. 417)

In re BLUM.

BLUM et al. v. HOUSER.

(Circuit Court of Appeals. Seventh Circuit. June 14, 1917.)

No. 2378.

BANKRUPTCY ⟹447—DECISION ON REVIEW—CONSTRUCTION.

On June 9th the referee made an order restraining the petitioners from transferring certain money. On June 30th he made another order requiring petitioners to turn over such money to the trustees. One of the petitioners sought to review and reverse both orders through separate petitions addressed to the District Court. Both petitions were heard at the same time, and but one order dated November 20, 1911. made "adjudging that the said orders dated June 9, 1911, and June 30, 1911, be, and the same are hereby, in all things affirmed." Thereafter petitioners secured a review by this court which adjudged that "the order or decree of the said District Court entered in this case November 20, 1911, be, and the same is hereby, reversed." *Held*, that the decree of this court vacated both orders.

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Petition to Review and Revise Order made by the District Court of the United States for the Western District of Wisconsin.

In the matter of David Blum, bankrupt. Petition by David Blum and another against Walter L. Houser, trustee in bankruptcy, to review an order of the District Court confirming an order of the referee. Order vacated.

Andrew Gilbertson and Moritz Wittig, both of Milwaukee, Wis., for petitioners.

Richmond, Jackman & Owen, of Madison, Wis., for trustee.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

EVANS, Circuit Judge. A previous order of this court made in this bankruptcy matter when another order was reviewed, disposes of the only question now presented for determination.

Upon an involuntary petition being filed against the bankrupt, David Blum, and an adjudication in bankruptcy following, a reference was ordered and a trustee appointed. At the creditors' meeting, the bankrupt was examined in open court and the referee concluded that certain transfers had been made by the bankrupt to his wife in fraud of creditors. It further appeared that the wife disposed of the property so conveyed, and the proceeds were deposited in a bank in the city of Milwaukee.

Both petitioners were then present at the examination, and the referee made the following announcement:

"On the testimony so far before the referee, it seems to me that the $3,300 received by Mrs. Blum is the property of the bankrupt, David Blum. She is ordered not to use any of that money, not to use that money for any personal purpose, and that she be ordered to turn it over to the trustee in this matter forthwith."

On June 9, 1911, a formal written order was signed, the effect and intent of which was to embody therein the oral announcement of May 31st. That order reads as follows:

"Now, therefore, it is hereby ordered that David Blum and Nettie Levy Blum and their agents be and they are hereby enjoined and restrained from in any manner transferring or disposing of the sum of $3,300, being the money received from Joseph J. Schwartz and Bertha Schwartz, his wife, and being the proceeds of the sale of a certain moving picture house in Milwaukee, Wis., until the further order of this court. This order to take effect and be in force as of the 31st day of May, A. D. 1911."

Upon the same day an order was made requiring petitioners to show cause why the money realized by Nettie Blum from the sale of the moving picture business should not be immediately turned over to the trustee. Objection was made that the referee was powerless to pass upon the title to this money in a summary proceeding, but the objection was overruled, and an order bearing date June 30, 1911 was made, the essential part being as follows:

"Second, it is ordered that the said Nettie Levy Blum and David Blum forthwith turn over to the said Walter L. Houser, in his capacity as trustee in the estate of David Blum, bankrupt, the sum of $3,000, being the amount

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of money originally invested in the moving picture business in Milwaukee, Wis., by the said David Blum, and which said investment was returned and paid on or about the 16th day of May, A. D. 1911, by Joseph Schwartz."

The petitioner Nettie Blum sought to vacate both orders above quoted through separate petitions to review and revise, addressed to the District Court. Both petitions were heard at the same time, and but one order was made, the material part of which was as follows:

"The review of the orders of the referee, dated June 9, 1911, and June 30, 1911, coming on to be heard and argued by counsel, in consideration whereof, and upon the record in this matter, it is adjudged that the said orders dated June 9, 1911, and June 30, 1911, be, and the same are hereby, in all things affirmed.

"Dated November 20, 1911."

Thereupon the petitioner Nettie Blum secured a review by this court of the order made on November 20th, with the result that such order was reversed and vacated. See opinion of this court in 202 Fed. 883, 121 C. C. A. 241.

The trustee thereafter assailed the transfer from husband to wife in a plenary action wherein a money judgment was sought in an amount equal to the sum realized from the sale of the moving picture business referred to in the foregoing orders. The action was tried before the court and a jury, and judgment was rendered in favor of the trustee, and against the petitoners herein for $3,875.78. Upon the marshal returning the fieri facias wholly unsatisfied, proceedings were instituted before the referee, resulting in an order the validity of which is challenged by this proceeding to review and revise.

After failing to collect its judgment against the petitioners, trustee applied to the referee for an order directing petitioners to pay over the amount of money in their possession May 31, 1911, that was realized from the sale of the moving picture business. This application was based upon the oral order of May 31st, followed by the written order of June 9th, which it was claimed had remained in force unmodified from the date of its entry.

Petitioners opposed the trustee's application, and therein asserted, among other claims, that this order of June 9th had been vacated by this court in the proceedings heretofore referred to, and the referee was powerless to enforce it. The referee overruled the petitioners' answer, and ordered them to answer to the merits within five days. On review, this order was confirmed by the District Court, and it is this last order that is now under consideration.

The order here in question must be sustained, if at all, upon respondent's claim that the original order of June 9th was not vacated by this court. In other words, it must be conceded that, if the order of June 9th was vacated by this court on the previous hearing, then the order under present consideration must be vacated.

The order attacked in this court on the previous hearing was the order of November 20th, heretofore set forth, which order particularly confirmed not only the order of June 30th, but also the order of June 9th. The direction of this court in respect thereto was as follows:

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"The decree of the District Court must be reversed, with directions to vacate the same and release further jurisdiction of the summary proceeding."

The mandate of this court is as follows:

"On consideration whereof it is now ordered, adjudged, and decreed by this court that the order or decree of the said District Court entered in this case November 20th, 1911, be, and the same is hereby reversed with costs; and that the said District Court vacate same and release further jurisdiction of the summary proceeding."

Both the order of June 9th and the order of June 30th were made in a summary proceeding.

Respondent admits that the decree of this court vacated and set aside the order of the referee bearing date June 30th. No reason is advanced and none is apparent why the order of this court vacating the order of the District Court bearing date November 20th should vacate the order of the referee made on June 30th, and not vacate the order of June 9th. There can be no escape from the conclusion that this court on the previous hearing vacated the order of the District Court made on November 20th, which in turn vacated the orders of the referee made on June 9th and on June 30th.

It follows, therefore, that the order of April 3, 1916, here under consideration must be vacated, and the proceedings before the referee to enforce the order of June 9th dismissed.

It is so ordered.

(244 Fed. 420)

MYERS v. HALLIGAN, Warden of United States Penitentiary, et al.

(Circuit Court of Appeals, Ninth Circuit. August 6, 1917.)

No. 2869.

HABEAS CORPUS ⚷4—GROUND OF RELIEF—WANT OF JURISDICTION.

One convicted may not be released on habeas corpus because tried while an escaped insane patient, this not depriving the court of jurisdiction, so trying him being, at most, error for which appeal is the remedy.

Appeal from the District Court of the United States for the Southern Division of the Western District of Washington; Edward E. Cushman, Judge.

Habeas corpus by Charles Myers against O. P. Halligan, Warden, and another. From an adverse judgment, petitioner appeals. Affirmed.

Van M. Dowd, of Tacoma, Wash., for appellant.

Clay Allen, U. S. Atty., of Seattle, Wash., and Geo. P. Fishburne, Asst. U. S. Atty., of Tacoma, Wash., for appellees.

Before GILBERT and HUNT, Circuit Judges, and WOLVERTON, District Judge.

WOLVERTON, District Judge. On November 21, 1914, the petitioner herein was brought before a United States commissioner for trial, on a charge of obtaining money under false pretenses, and, having entered a plea of insanity, the trial proceeded. The jury impaneled in the cause found that Myers was insane at the time, and he was ac-

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cordingly committed to the Morningside Sanitarium, at Portland, Or., on May 6, 1915. He escaped from that institution in June, and was next in evidence at Tanana, Alaska, in July, 1915. He was later arrested and put on trial for the offenses of which he was convicted. The judgment shows that he was indicted February 19, 1916, that the offenses with which he was charged were committed October 3, 1914, near the time of the commission of the offense for which he was previously tried, and that he was committed to the penitentiary at McNeil Island for the aggregate term of five years. The proceeding now inaugurated and pending is designed to liberate him from prison.

The principal, and in reality the only, ground relied upon for his liberation is that he could not be lawfully tried while an escaped insane patient.

We think the plain answer to the contention is that the fundamental underlying principle of the writ of habeas corpus is that it is not in any sense a writ of error, and cannot be used to correct mere irregularities in procedure.

> "No court," says the Supreme Court in Kaizo v. Henry, 211 U. S. 146, 148, 29 Sup. Ct. 41, 42 (53 L. Ed. 125) "may properly release a prisoner under conviction and sentence of another court, unless for want of jurisdiction of the cause or person, or for some other matter rendering its proceedings void."

Or, as concisely stated in the headnote to Harlan v. McGourin, 218 U. S. 442, 31 Sup. Ct. 44, 54 L. Ed. 1101, 21 Ann. Cas. 849:

> "The writ of habeas corpus cannot be used for purposes of proceedings in error; the jurisdiction under the writ is confined to determining from the record whether the petitioner is deprived of his liberty without authority of law."

See, also, Glasgow v. Moyer, 225 U. S. 420, 32 Sup. Ct. 753, 56 L. Ed. 1147, and Ex parte Spencer, 228 U. S. 652, 33 Sup. Ct. 709, 57 L. Ed. 1010.

The petitioner files his own petition for the writ, not by another; and neither in his petition nor in a lengthy affidavit filed in its support does he pretend that he was insane or non compos at the time of the trial at which he was convicted.

The trial, it will be noted, was upon different charges from the one preferred against him at the trial on which he was adjudged insane. He therefore was in a position to interpose the defense of insanity in the later case as well, or the defense, if it amounted to such, that he was an escaped insane person, and if he neglected to do so, it was a matter of his own choosing. That court was competent to try all these matters, and if it erred touching the same, the petitioner's remedy was by appeal therefrom, and not by writ of habeas corpus. That he might have been insane at the time of the commission of the offenses with which he was charged, or at some time had been adjudged insane and had escaped from his place of confinement without a regular discharge, affords no reason why the court was without jurisdiction to try him on the later charges. Insane persons are brought into court every day, and their cases are humanely and properly disposed of without resort to habeas corpus. We are unable to see that the petitioner here is any exception to the general rule.

Judgment affirmed.

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(244 Fed. 422)

MINER v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. August 27, 1917.)

No. 2236.

1. CRIMINAL LAW ⟹979(2)—SENTENCE—IMPOSITION AFTER TRIAL TERM—JURISDICTION.

Jurisdiction to impose sentence at a term after the trial term is retained, where the court's purpose in postponing sentence is not to pardon or parole, but is incident to the administration of justice within its powers, and its orders of postponement are unconditional and for definite periods.

2. CRIMINAL LAW ⟹1144(17)—APPEAL—PRESUMPTION—REASONS FOR POSTPONING SENTENCE.

Regarding jurisdiction to impose sentence after the trial term, notwithstanding postponements from term to term, indicated to be unconditional, applied for by defendant and opposed by the government, it must be presumed that they were for a lawful purpose; the reasons not appearing of record.

In Error to the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

John Read Miner was sentenced on plea of guilty, and brings error. Affirmed.

George C. Bradshaw and Thomson & Bradshaw, all of Pittsburgh, Pa., for plaintiff in error.

E. Lowry Humes, Asst. U. S. Atty., of Pittsburgh, Pa., and Neil W. McGill, Asst. U. S. Atty., of Cleveland, Ohio.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. John Read Miner was indicted for violating section 5209, Revised Statutes (Comp. St. 1916, § 9772). On March 11, 1915, he entered a plea of guilty. Sentence was deferred to May 1, 1915. Thereafter sentence was postponed on the application of the defendant from term to term for three terms, recognizance being required and given at each term for his appearance at the next. On January 15, 1917, he was called for sentence. In response, he filed a motion in arrest of judgment. Upon its denial, sentence was imposed. He now brings this writ and raises the question: Whether the court, by failing to impose sentence at the trial term, lost jurisdiction to impose sentence at a later term.

In support of his contention that the postponement of sentence beyond the trial term, though on his motion, deprived the court of jurisdiction to impose sentence upon him at any other term, the defendant cites for authority Ex parte United States (Killetts), 242 U. S. 27, 37 Sup. Ct. 72, 61 L. Ed. 129, Ann. Cas. 1917B, 355, and numerous state decisions, holding that a court is without power to suspend a sentence once imposed, and similarly is without power to suspend the imposition of sentence, conditioned, in either instance, upon the good behavior of the prisoner or upon the future attitude of the court toward him.

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These decisions are based upon the principle that the penalty for a crime is a matter within the legislative department of the government, the imposition of the penalty by sentence is the function of the judicial department, to be performed as prescribed, and relief therefrom by pardon is exclusively within the executive department. This principle, of course, is not open to dispute. The questions are, when is the principle invaded, and what is the effect of its invasion upon the further jurisdiction of the court over an offender?

It is now very generally held that the principle is invaded when a court, by an act done either before sentence or after, attempts to pardon a convict, or to parole him when it is not vested with power of parole, or to parole him in a manner different from that provided by law. That such an act is beyond the jurisdiction of a federal court and therefore invalid, has lately been decided by the Supreme Court in the Killetts Case. There the prisoner had been convicted and sentence had been imposed. The court then ordered, "that the execution of the sentence be, and it is hereby, suspended during the good behavior of the defendant, and for the purpose of this case the term of this court is kept open for five years." The Supreme court held the order invalid and directed that it be vacated.

While it is no longer questioned that an order of suspension either of sentence or of the imposition of sentence in the exercise of a power of pardon or parole not possessed by a court is invalid, the courts are divided upon the question of the legal effect of such an invalid order upon the continued jurisdiction of a court to impose or enforce a sentence after the term, some holding that jurisdiction is lost by the illegal act, others that it is retained.

In State of Kansas v. Sapp, 87 Kan. 740, 125 Pac. 78, 42 L. R. A. (N. S.) 249, the court recognized the general rule that where a verdict or plea of guilty is final, a court has no discretion, as a disciplinary measure, to suspend the imposition of sentence, and held, that the legal effect of the exercise of such discretion by suspending the imposition of a sentence, indefinitely or conditionally, is to deprive the court of jurisdiction to impose sentence at a later term. Other courts have held the same view with reference to sentences imposed and conditionally suspended. United States v. Wilson (C. C.) 46 Fed. 748; Ex parte Clendenning, 22 Okl. 108, 97 Pac. 650, 19 L. R. A. (N. S.) 1041, 132 Am. St. Rep. 628; Ex parte Peterson, 19 Idaho, 433, 113 Pac. 729, 35 L. R. A. (N. S.) 1067; In re Strickler, 51 Kan. 700, 33 Pac. 620; Gray v. State, 107 Ind. 177, 8 N. E. 16; Com. v. Maloney, 145 Mass. 205, 13 N. E. 482; Weaver v. People, 33 Mich. 296; Grundel v. People, 33 Colo. 191, 79 Pac. 1022, 108 Am. St. Rep. 75; Re Flint, 25 Utah, 338, 71 Pac. 531, 95 Am. St. Rep. 853; People v. Allen, 155 Ill. 61, 39 N. E. 568, 41 L. R. A. 472; People v. Barrett, 202 Ill. 287, 67 N. E. 23, 63 L. R. A. 82, 95 Am. St. Rep. 230; State v. Hockett, 129 Mo. App. 639, 108 S. W. 599; In re Beck, 63 Kan. 57, 64 Pac. 971.

Opposed to this line of cases is another, in which the invalidity of an order conditionally postponing or suspending sentence is similarly recognized, but an opposite view of its effect upon the court's juris-

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diction is entertained. In these cases it is held, in effect, that the order, being illegal, is so, not because it is irregular or technically defective, but because it is beyond the power of the court, and being for that reason void, the conviction or sentence stands, unaffected by the order, and is enforceable by the court at any time after the term, and until the convict has suffered the penalties the law imposes. Morgan v. Adams, 226 Fed. 719, 141 C. C. A. 475; State v. Abbott, 87 S. C. 466, 70 S. E. 6, 33 L. R. A. (N. S.) 112, Ann. Cas. 1912B, 1189; State v. Drew, 75 N. H. 402, 74 Atl. 875; Sylvester v. State, 65 N. H. 193, 20 Atl. 954; State v. Hatley, 110 N. C. 522, 14 S. E. 751; State v. Whitt, 117 N. C. 804, 23 S. E. 452; Tanner v. Wiggins, 54 Fla. 203, 45 South. 459, 14 Ann. Cas. 718; Fuller v. State, 100 Miss. 811, 57 South. 806, 39 L. R. A. (N. S.) 242, Ann. Cas. 1914A, 98.

[1] From this brief survey of the cases it is pertinent to note, that the question before us as to the jurisdictional effect of the court's orders postponing sentence from term to term is controlled by the validity or invalidity of the orders, and the validity of the orders is determined by their character and purpose. If, in this case the purpose of the District Court in postponing sentence was to pardon or parole the defendant, then we have to decide whether the court had jurisdiction to impose sentence at a later term. If, on the other hand, the court's purpose was incident to the administration of justice within its conceded powers, and its orders postponing sentence were unconditional and to definite periods, then we have no jurisdictional question before us, for all courts agree that in such a case jurisdiction to impose sentence at a term after the trial term is retained.

[2] What then does the record show as to the validity of the orders? The record shows that sentence was regularly postponed from term to term, recognizances given and appearance made. The postponements, therefore, were entirely definite. They were made in each instance upon application of the defendant and against objection by the government. Hence we must assume that some reasons for the postponements were offered and controverted by the parties, and in that sense were litigated before and decided by the court. The reasons for the postponements do not appear of record. We cannot assume that they were not substantial.

There is nothing to show that the postponements were conditional. On the contrary, the proceedings clearly indicate that they were unconditional. If the court was moved by impulse to postpone sentence, it does not so appear. We should not assume that it was actuated by improper or unlawful considerations. Nor does the court's purpose appear. But every legal intendment favors the notion that it had a purpose and that the purpose was lawful. In fact, we must assume, in the absence of anything in the record to the contrary, that the postponements were made for a lawful purpose in the orderly progress of the case. This being true, the validity of the orders postponing sentence is established, leaving for decision no question of the court's jurisdiction to impose sentence at a later term.

The judgment below is affirmed.

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(244 Fed. 425)

SCHAEFFER v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. August 27, 1917.)

No. 2237.

In Error to the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Christian F. Schaeffer was sentenced on plea of guilty, and brings error. Affirmed.

George C. Bradshaw and Thomson & Bradshaw, all of Pittsburgh, Pa., for plaintiff in error.

E. Lowry Humes, U. S. Atty., of Pittsburgh, Pa., and Neil W. McGill, Asst. U. S. Atty., of Cleveland, Ohio.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

PER CURIAM. This writ raises the question decided in Miner v. United States, 244 Fed. 422, 157 C. C. A. 48. On authority of that case, it is ordered that the judgment below be affirmed.

(244 Fed. 425)

CITIZENS' COAL & SUPPLY CO. v. CUSTARD.

(Circuit Court of Appeals, Fourth Circuit. July 19, 1917.)

No. 1539.

1. BANKRUPTCY ⟹140(1)—PROPERTY—PASSING OF TITLE.

Representation of purchaser in contract of sale of cement that it would be used in construction of a certain building which he had contracted to build is, at most, a promise the breaking of which by reason of his becoming bankrupt did not affect title to such cement as was delivered, which therewith passed to him, and thereafter vested in the trustee in bankruptcy.

2. SALES ⟹474(2)—CONDITIONAL SALES—EFFECT AS TO BUYER'S CREDITORS—RECORDING.

By provision of Code 1913 West Va. c. 74, § 3 (sec. 3831), to entitle seller of personalty delivered to purchaser to benefit of reservation of title till price is paid as against buyer's creditors, the contract must be recorded.

Appeal from the District Court of the United States for the Southern District of West Virginia, at Bluefield.

Proceeding in bankruptcy by the Citizens' Coal & Supply Company against J. H. Custard, trustee of the Bluestone Construction Company, bankrupt, to reclaim property sold by said Company to bankrupt. From a judgment confirming decision of the referee in bankruptcy in favor of the trustee, the seller appeals. Affirmed.

Russell S. Ritz, of Bluefield, W. Va., for appellant.

W. E. Ross, of Bluefield, W. Va., for appellee.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

KNAPP, Circuit Judge. In October, 1916, the parties named therein made this contract:

"Citizens' Coal & Supply Company, of Bluefield, W. Va., hereinafter called the seller, sells, and Bluestone Construction Company, of Bluefield, W. Va.,

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hereinafter called the purchaser, purchases, Lehigh Portland cement on the following terms and condition:

"The purchaser does hereby represent to the seller that twelve hundred (1,200) barrels of cement are to be used in the construction of State Normal School building, Short Creek, W. Va., for which construction the purchaser has contract, and that he hereby purchases twelve hundred (1,200) barrels of Lehigh Portland cement from the seller for use in such work, and that no portion thereof will be used for any other purposes. * * *

"If the purchaser shall fail to comply with any of the terms, conditions, or limitations of this contract, or if any of the purchaser's representations herein are untrue, the seller may cancel this contract or any portion thereof, or any other order given to the seller by the purchaser, and such cancellation shall in no wise release the purchaser from unpaid accounts or from liability to said seller at the contract price for cement delivered prior to such cancellation."

Other provisions, not in dispute, relate to price, terms of payment, time and place of delivery, and the like.

Under this contract two carloads of cement were delivered, one in December, 1916, the other in January, 1917, and the purchaser stored the same on the premises where the school building was to be erected. On February 10, 1917, the purchaser, Bluestone Construction Company, was adjudicated bankrupt on its own petition, and a few days later Custard, the appellee, was appointed and qualified as trustee. At that time little or nothing had been done towards the construction of the building, except to make the excavation, and the bankruptcy of the contractor resulted in a total abandonment of the contract. The trustee took possession of the cement that the bankrupt had received and refused the seller's demand for its return. In a proceeding to reclaim the property the referee in bankruptcy decided in favor of the trustee, and his ruling was confirmed by the District Court. The seller appeals.

[1] It seems evident that the sale in question was absolute, and not conditional. The contract imports an absolute sale and contains no reservation of title express or implied. Credit was not obtained by the misrepresentation of any existing fact, either as to the solvency of the purchaser or otherwise. The cement was sold on time because, as the active partner of appellant testifies:

"We had done business with Mr. Lucas [the manager of the bankrupt concern] previous, and always found him very prompt in paying his bills."

In short, the sole basis of the asserted right to reclaim was the failure, brought about by bankruptcy, to use the cement furnished in erecting the building for which it was procured. But the "representation" that it would be so used was, at most, a promise to be kept in the future, the breaking of which in the manner shown did not and could not affect the purchaser's title. Indeed, we deem it too plain for argument that the title to this cement passed with its delivery to the construction company, and thereafter became vested in the trustee by virtue of the Bankruptcy Act.

[2] Nor would it aid the appellant to treat the contract in question as conditional, since in that case it would be void as against creditors for want of record under the stringent provisions of section 3, c. 74, of the Code of West Virginia (sec. 3831). The decision in Hyer v.

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Smith, 48 W. Va. 550, 37 S. E. 632, is conclusive upon this point, the syllabus reading as follows:

"To entitle a vendor of personal property to the benefit of the reservation of title as security for the purchase money thereof, as against creditors and purchasers, under section 3, c. 74, an agreement or contract must be made cotemporaneously with the sale, or before the delivery of possession of the property, between the vendor and vendee, that such reservation shall be made, and such reservation recorded."

It is sufficient to add that under the amendment of 1910 (Act June 25, 1910, c. 412, § 8, 36 Stat. 840, amending Act July 1, 1898, c. 541, § 47, 30 Stat. 557 [Comp. St. 1916, § 9631]):

The trustee of a bankrupt, "as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon."

In our judgment, the title of appellee to the cement in controversy is not open to dispute.

The decree appealed from is affirmed.

(244 Fed. 427)

GALION IRON WORKS CO. et al. v. OHIO CORRUGATED CULVERT CO. et al.

(Circuit Court of Appeals, Sixth Circuit. June 30, 1917.)

No. 3002.

1. INJUNCTION ⟹118(4)—SUIT TO ENJOIN ACTIONS AT LAW—SUFFICIENCY OF BILL.

A bill filed by the defendant in five actions at law in the same court brought by different territorial licensees for infringement of the same patent, alleging that all the actions involved the same questions, and praying that all be stayed except one to be selected and tried as a test case, *held* not to state a cause of action for equitable relief; there being no allegation that the several plaintiffs had refused to join in making a test case, and it not appearing that the court could not on motion in the law cases so regulate their hearing as to prevent hardship or oppression.

2. DISCOVERY ⟹9, 19—IN EQUITY—NECESSITY FOR EVIDENCE.

It is essential that a bill of discovery disclose a substantial necessity for the relief, and such a bill in aid of a defense at law cannot be maintained with the result of delaying the orderly prosecution of the action at law, where complainant is in possession of ample proof of the allegations in aid of which the evidence is sought, or where such evidence is plainly cumulative or comparatively unimportant.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Ohio; John H. Clarke and John M. Killits, Judges.

Bill in equity by the Galion Iron Works Company and others against the Ohio Corrugated Culvert Company and others. From a decree dismissing the bill, complainant appeals. Affirmed.

Complainant below, the Galion Company, was engaged in manufacturing and selling, throughout the United States, a corrugated steel culvert. A patent touching this subject-matter had been issued to James H. Watson, and he

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had subdivided the United States into 31 districts, granting 31 licensees the exclusive right to make, use, and sell the invention within their respective districts. The patent having expired, the Ohio Corrugated Culvert Company brought a suit at law against the Galion Company in the court below for infringement of this patent through sales made by the Galion Company within the exclusive territory of the Ohio Company. Four others of these territorial licensees brought, in the same court, four other similar suits. Thereupon, the Galion Company filed in the same court a bill in equity making defendants thereto all the territorial licensees, and praying, first, that four of the pending suits, and the twenty-six other suits alleged to be threatened by the other licensees, be enjoined pending the hearing and disposition of one case to be selected as a test case, by the result of which the others must abide; and praying, second, discovery of various matters said to be essential to the making of the proper defense to the suits at law. No one of the five plaintiffs, in the suits brought, was a resident of Ohio or had any agent therein upon whom service of process could be made; but, upon the theory that the bill was ancillary to the suits at law, complainant made a motion for an order that service be directed upon the plaintiffs' counsel of record in the lawsuits. A motion was also made for leave to file interrogatories and for an order that answers be made thereto. In opposition to these motions, it was insisted that the bill did not state a case entitling the complainant to any relief in equity, and the District Court, being convinced that this view was correct, dismissed the bill. The Galion Company brings this appeal.

Harry Frease, of Canton, Ohio, for appellants.
George Mankle, of Chicago, Ill., for appellees.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge (after stating the facts as above). [1] In so far as injunction was sought against the prosecution of more suits than one, and by analogy to the nomenclature most nearly appropriate, this may be named a bill of peace. Assuming to the fullest extent complainants' general theories of this particular remedy, we agree with the court below that the facts here disclose no sufficient reason for the exertion of the powers of a court of equity through an independent bill. The apprehended suits were threatened by parties not within the jurisdiction of the court, and against whom there could be no relief. The five existing suits were pending in the same court before the same judge. There is no satisfactory and sufficient allegation that the several plaintiffs declined to enter into any reasonable arrangement whereby one suit should become a test case; nor, if the allegations on this subject be thought sufficient, does any reason appear why the court would not, upon motions in the law cases, regulate their hearing so as to prevent hardship or oppression. If it be true that all the licensees had a common interest in all the cases in that each suit is in fact prosecuted for the benefit of all—as is now claimed—this fact can be developed without difficulty as other facts are proved in cases at law, and a judgment in one case would become an adjudication in the others. Penfield v. Potts (C. C. A. 6) 126 Fed. 475, 61 C. C. A. 371; Greenwich Co. v. Friedman (C. C. A. 6) 142 Fed. 944, 74 C. C. A. 114. Indeed, counsel for appellees on the hearing in this court offer to join in any reasonable stipulation to make one case the test of others, or to use in one proofs in another, and we assume that

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they will, in the court below, adhere to this offer. Upon the whole and upon this branch of the case, we see no sufficient basis for the suit.

[2] Coming to the subject of bills of discovery: For the purposes of this opinion, but without deciding, we may assume that appellants are right in their positions, which they base upon Carpenter v. Winn, 221 U. S. 533, 31 Sup. Ct. 683, 55 L. Ed. 842. See, also, Cheatham Co. v. American Co. (D. C.) 198 Fed. 496; General Film Co. v. Sampliner (C. C. A. 6) 232 Fed. 95, 146 C. C. A. 287. These are: (1) The jurisdiction of a federal court of equity continues unimpaired to entertain a bill for discovery only filed in aid of the claim, affirmative or negative, made in another suit by the party who files the bill; (2) the various existing methods to procure evidence in proceedings at law are not "remedies," as that word is used in R. S. § 723 (Comp. St. 1916, § 1244); and (3) the cases like Brown v. Swann, 10 Pet. 497, 9 L. Ed. 508, and United States v. Bitter Root Co., 200 U. S. 451, 26 Sup. Ct. 318, 66 C. C. A. 652, which intimate that it must appear that the evidence can be obtained in no other way, were cases brought for discovery and relief, and, consequently, are not pertinent. Conceding all these contentions and the further claim that the right in a proper case to have a decree for discovery is absolute and not discretionary with the court (Bell v. Pomeroy, Fed. Cas. No. 1,263), it still must be essential that the bill disclose a substantial necessity for the relief. There is neither precedent nor—as we think—reason for the institution of an independent proceeding in equity, delaying or tying up the orderly prosecution of a suit at law, if the only thing to be gained is the disclosure of evidence comparatively unimportant or merely cumulative. This bill discloses that the Galion Company is in the possession of ample and satisfactory proof of a great part of the things alleged; but, as to the remainder (and with one exception), it seems to pertain to matters which are relatively unsubstantial or are plainly cumulative. More specifically, the Watson patent has been sustained by the Court of Appeals for the Second Circuit. Its opinion discloses that the widespread public adoption of the device was an element of importance in determining that the invention was patentable.

The present bill alleges that this public adoption, and such public acquiescence in the patent as there was by decree or otherwise, resulted from other causes than the merits of the patent, e. g., combinations and promotive plans among the territorial licensees, payments and concessions to induce the cessation of any infringement and to procure consent decrees, the control through another patent of the only suitable material, etc., and it sets out much evidence of the same class and to the same effect already in the possession of the Galion Company. The careful analysis of the bill, found in appellant's brief, shows that seven of the eight points covered pertain each to an item of evidence tending to establish some one of these facts, which fact, in turn, tends to discredit the drawing of any presumption of patentable novelty from the history of the public adoption of the patented article, but no one of which is controlling as to the ultimate inference. We are clear that such things are beyond any scope which, under the most liberal construction, can now be permitted for bills of discovery.

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The eighth point pertains to the common interest of all licensees in every suit by any one of them, and this can be material only because it may disclose a lack of right by one licensee to sue alone or because a judgment in one case will be a bar to the others. As to the first reason, in that event the bill would affect the title of the adverse party, and be a fishing bill. As to the second, there is no room to claim a former adjudication, until there has been a judgment, and the Galion Company's rights are protected by the control which the law court has over the five pending suits.

The decree below is affirmed.

(244 Fed. 430)

INVENTIONS CORP. v. HOBBS et al.

(Circuit Court of Appeals, Second Circuit. May 8, 1917.)

No. 259.

1. CORPORATIONS ⟹548(9)—GRANT OF LICENSES UNDER PATENTS—KNOWLEDGE AND INTENT OF LICENSEE.

A judgment creditor of a corporation which was the owner of patents, *held*, on the evidence, not entitled to the cancellation of certain license contracts made by the company pending the action which resulted in the judgment as having been made to hinder, delay, and defraud creditors, the action being one at law which left the corporation free to contract, and it appearing that the licensees acted in good faith for their own interest and paid a substantial and reasonable amount under all the circumstances for the rights secured.

2. CORPORATIONS ⟹523—PROCEEDINGS SUPPLEMENTARY TO EXECUTION—SERVICE—FRAUDULENT RESIGNATION OF OFFICERS.

Code Civ. Proc. N. Y. §§ 2468, 2469, provide that the property of a judgment debtor vests in a receiver appointed in supplementary proceedings from the date of his appointment, and that when it has become so vested it relates back for the benefit of the judgment creditor in case an order requiring the debtor to appear for examination has been served to the date of such service. In such a proceeding against a nonresident corporation service of an order for examination was made on a resident who had been and was still supposed to be the president and a director of the defendant, and he appeared with counsel without objection. He had previously resigned as president, and his resignation had been accepted. He had also later sent his resignation as director, which was not accepted until afterward. The resignations were part of a fraudulent scheme to prevent the collection of the judgment. The proceedings resulted in the appointment of a receiver. *Held*, that whatever the effect of the fact that his resignation as director had not at that time been accepted might have as between him and the corporation, the resignation was not effective as against the judgment creditor, and the service on him was a valid service on the corporation, and carried back the receiver's title to that date to the exclusion of that of a trustee in bankruptcy appointed in voluntary proceedings instituted more than four months thereafter.

3. EXECUTION ⟹409—SUPPLEMENTARY PROCEEDINGS—RECEIVERS—SALE OF PATENTS.

While a receiver in supplementary proceedings may not, by virtue of his appointment, acquire title to patents so as to enable him to execute a

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⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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valid assignment to a purchaser, a court of equity has power to order such assignments made by the proper person.

Appeal from the District Court of the United States for the Southern District of New York.

Suit in equity by the Inventions Corporation against John H. Hobbs, Harris Hammond, Clyde H. Slease, Lewis C. Van Riper, the Continental Motion Picture Company, Incorporated, the Vanoscope Company, Incorporated, and Henry B. Singer, as trustee in bankruptcy of the Vanoscope Company. From the decree complainant appeals. Modified anr affirmed.

See, also, 233 Fed. 53, 147 C. C. A. 123; 244 Fed. 445, 157 C. C. A. 71.

The following is the opinion of Learned Hand, District Judge:

The turning point of this case on the merits is whether the two contracts of May 9, 1914, and April 10, 1915, were in fraud of Robinson. It is of no consequence whether Hobbs and Hammond had earlier designs upon the stock of the Vanoscope Company which might have conflicted with Robinson's contract. If there is no evidence that the license agreements obstructed the collection of Robinson's claim, then this case must fall, regardless of other consideration. This claim before May 9, 1914, had become no more than for money, and later resulted in a judgment for money; obviously, there could be no fraud affecting the judgment which did not diminish the value of the property of the Vanoscope Company subject to be reached in execution. Now it is true that the Vanoscope Company under the contract parted with the right to exploit its patent except for the manufacture of home machines, and that this was the practical equivalent of an assignment to that extent of its rights. As the patent could have been made available upon Robinson's claim—though not subject to levy under execution—and as the license agreements prevented him from getting the benefit of the full value of the patents upon sale or the like, certainly it is true that they hindered and delayed him prima facie in his rights as a creditor. Yet these same agreements contained considerations, which gave the Vanoscope Company certain rights having more than merely a colorable value, and therefore the case is not one where the contract is a mere device to cover a gratuitous grant. The intent to hinder creditors does not follow necessarily from such agreements; it must independently appear that they were made with that intent. That Robinson should be hindered in his remedies against the patents would equally follow from any sale, yet the sale would not be fraudulent if the consideration was reasonably sufficient and equally available to him. In such cases it must appear that the parties were actuated by a desire to prevent the creditor from getting as much as he otherwise would, and that without added trouble.

There is no such proof respecting the first agreement, that of May 9, 1914. The payment down of $50,000 for a patent which had never been exploited, and which depended absolutely for any value upon its future success would alone suggest that the parties were not concerned in defrauding Robinson. The plaintiff urges that I must suppose that Van Riper appropriated this money, and that Hobbs & Hammond were in collusion with him. There is not a whit of evidence remotely suggesting any collusion between Van Riper and the New York Company if Van Riper embezzled the money, and there is indeed no evidence that he did embezzle it, except in so far as one may guess so from its disappearance.

Yet if I were to disregard this initial payment, and consider the contract as though it had not been paid, it would still not give any evidence of fraud. It contemplated the manufacture of 1,000 machines which were to be leased at between $20 and $30 a month. This meant, if the machine turned out a success, a gross return of between $240,000 and $360,000 during the first year of full exploitation. If we take the lower of these two figures the account between the two parties for the first seven years would have been as follows:

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Vanoscope Co., Inc.		Vanoscope Company.
Operating expenses	$ 60,000	$240,000
Common dividend	42,000	
	$102,000	
Preferred sinking fund	45,000	
Average preferred stock dividend	10,500	157,500
	$157,500	$82,500

In this account I have figured the average of the preferred stock dividends, since they were to be computed each year upon only so much as the accumulated sinking fund should not cover at 105. I have also disregarded the repayment of $50,000 for the obvious reason that it had already been paid out to Vanoscope Company as advanced royalties. The preferred stock represented the outside amount of capital to be invested, and the provisions for its redemption were certainly intended to repay the New York Company for all expenses of actual manufacture. The redemption provisions were therefore meant to be a way of repaying the expenses of manufacture; at least there was no other. The other expense was of general exploitation of the machines, of "operating" as it was called, which was fixed at 25 per cent. That this was a genuine estimate and not colorable is to be in any case assumed, and is strongly fortified, since it is the tentative figure fixed in the proposed contract between the Johns-Manville Company and the New York Company of the succeeding winter, into the negotiation of which no fraud could possibly have entered.

The result of the contract of May 9, 1914, was therefore that the real profits to the New York Company consisted of 7 per cent. on the preferred stock and 6 per cent. on the common stock of $700,000, which was all water. If the preferred dividend be averaged as above and the stock redemption and "operating" percentage be regarded as genuine expenses, the division if 1,000 machines were leased was $52,500 to the New York Company and $82,500 to the Vanoscope Company. If the machines had any life beyond seven years the division thereafter would have been $42,000 to the New York Company and $138,000 to the Vanoscope Company.

If the machines proved such a success that they could be rented for $30 a month, then the New York Company would have got the same return, but the Vanoscope Company $172,500 during the first seven years and $228,000 if the machine lived thereafter. In the second and third years the New York Company was to make 500 machines a year, and thereafter as many as the public required. The gross rentals on these were to be divided equally, with similar amortization agreements, if new capital were necessary.

It will be observed that the dividends are a first charge upon all earnings, and, as I shall show in another connection, the Vanoscope Company would not begin to make any money until more than 500 machines were leased at $20. It should also be observed that the amortization provision contains a premium of 15 per cent. on the preferred stock which may be sold at 90 and must be redeemed at 105. This adds 2 per cent. a year to the actual profits of the New York Company, or $6,000, and, strictly speaking, their return should figure at an average of $58,500 for the first seven years.

I can see nothing inequitable in this contract as a whole. It could not surely have been expected that capital must be forthcoming upon any such contingent enterprise at the mere return of 7 or 9 per cent. If we look at the common stock dividend as part of the interest, the aggregate rate was 23 per cent., certainly not exorbitant under the circumstances. The company had never put out a machine, had no capital to develop its business, and the value of the patent lay, and for that matter still lies, wholly in supposition. It is quite true that this capital might continue to draw 14 per cent. after it had been repaid, but we have no knowledge of the life of the machines; perhaps no one knew whether they would be of any value even as long as that. If I were compelled merely to guess, I should feel quite sure that the machines would be either disabled or antiquated long before the period fixed. I have

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no hesitation in finding that the contract was not in fraud of Robinson, though it was made with full knowledge of his rights and of the action then pending.

Notice should be taken of a feature of the case not mentioned hitherto. Robinson swears that he showed to Hobbs and Hammond in February, 1914, a copy of his contract with Van Riper of October 31, 1912, part of which (article 2) gave him the exclusive agency to sell or lease machines or patents. This contract, though with Van Riper, was perhaps binding upon the Vanoscope Company, considering the control which Van Riper had of it. Hobbs and Hammond dispute Robinson's assertion that he ever showed them this clause of his contract, and I cannot make any certain finding in the case upon this conflict of testimony. The issue is nevertheless irrelevant in any case, because before May 9, 1914, Robinson had sued to recover damages for the breach of his contracts, and his position, therefore, on that date had already precluded him from recovering the stock, to which his rights of agency were only an incident. He had therefore put himself in a position where his right to any exclusive agency in selling machines or giving licenses under the patent had disappeared. Of this election Hobbs and Hammond had full notice, and their contract could not therefore have been in fraud of his rights under the Van Riper contract.

Manufacture under the contract was begun in July or August, 1914, and ten machines were started. None of them turned out satisfactory, and an issue arises as to whether the fault was of the New York Company's manufacturer, Garford, or of the design. It is quite clear that Berger in his letters of October was still experimenting with the machine to obviate a "vertical movement" of the films. Berger now says that the trouble was of the oxidization of the mirrors and of the metal which held them. At that time he did not mention those defects. Upon the conflict, if it be a conflict, between him and Lowenstein, I accept the latter as better qualified to judge, and I find that, regardless of any of the faults due to Garford, the machines had not yet been perfected. This conclusion is corroborated in some measure by two circumstances: First, that at least as late as December, 1913, or January, 1914, they had not been so perfected, for that was the issue in Robinson's suit; and, second, that none have yet appeared upon the market, though the defects mentioned by Berger could have been corrected by changes in material. Moreover, Berger himself made some changes, perhaps improvements to be sure, for which he is trying to get a patent. I am satisfied that the design was not commercially available in 1914.

Even though such were the fact, the plaintiff still insists that the New York Company was obliged to go on and make 1,000 machines or lose its deposit. Such a result would be grotesquely unjust and unreasonable; it would have been the surest way of destroying the patent and the interests of both parties to the agreement, and no court ought to put such a meaning on it unless the rules of law absolutely require it. They do not, because the case is clearly one where the contract was made under a common mistake of fact, each side thinking the machine already perfected in design. The suggested analogy of a sale caveat emptor is not applicable; in such sales there is no common mistake, for the seller knows, though he makes no representation. Moreover, if there is a common mistake, as for instance, regarding the actual existence of the goods, the contract of course may be voided. A seller has no interest in the goods sold after delivery; he cares only for the price. As to him the mistake, even if he shares in it, is not relevant to the transaction, so long as he gives no assurances to the buyer. But in the case at bar the licensor was as much interested as the licensee, because its payment, except the initial advance of $50,000, depended upon the success of the patent. If it had known the fault in design, it could not have intended the licensee to put out 1,000 machines; when it learned of the defect, it did not insist that the licensee should. To suggest that its failure to do so was evidence of fraud seems to me as perverse a position as the plaintiff could assume, and I pass it by.

The agreement of April 10, 1915, was made with a fuller knowledge, if possible, of Robinson's rights than its predecessor. The circumstances of its

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execution lend some color to suspicion that it was made against the possibility of a verdict. I think it was certainly made with that prospect in mind and to settle the rights which had arisen under the first contract, but I cannot accept Harding's statement that it was to be used only in case of a verdict. Some new contract was, in any case, necessary between the parties, and the possibility of such a one is foreshadowed as far back as the proposed contract between the New York Company and the Johns-Manville Company. Moreover, it is most unlikely that the drafting was left till April 10, as Harding recalls; the contract is elaborate, and could not be made hastily out of the earlier one. It shows evidence of much care in preparation, and bears the indorsement of Hobbs' lawyers, contrary again to Harding's recollection. However, while I reject the idea that it was intended only for such use, the time of its appearance justifies a close scrutiny of its terms in comparison with those of the earlier contract.

The two are of the same general kind, the New York Company to manufacture and exploit the patent as its exclusive licensee, agreeing to make 1,000 machines within 18 months after the design had become commercially available, with 1,000 additional machines (really at its option) within the following year. The only important distinction between the two is in the division of the rentals which were to be the same as in the earlier. Under the old contract the New York Company was to repay itself the cost of manufacture by an amortization clause redeeming the preferred stock in seven years at 15 per cent. a year. This redemption included also a 15 per cent. appreciation of the stock, which might be issued at 90 per cent. and was to be redeemed at 105 per cent. In estimating the cost of manufacture we should therefore take a yearly allowance of 13 per cent. upon the preferred capital for seven years, or $39,000 a year. This is obviously tentative, but for 1,000 machines as near as we can get. The old contract also allowed 25 per cent. of the gross rentals as expenses of exploitation, which must be admitted, making an added item of $60,000 a year to keep out 1,000 in the hands of exhibitors. Thus there would be a yearly outlay of $99,000 and a net income or profit of $141,000 under the old contract.

We have seen that the average yearly profits of the New York Company amounted to $58,500, which is therefore between 41 per cent. and 42 per cent. of the net profits so calculated. On the face of the second contract this gives place to 66⅔ per cent. of the net profits to the New York Company for the same undertaking as they entered into in the first. But there is one important difference between the two which should be remembered; the New York Company had a priority under the first contract for all its profits, while under the second it had none. The practical results of this are extremely important. Thus under the first contract the Vanoscope Company would have received in average yearly profits only $1,500, although 550 machines were leased for seven years at $20 a month. Under the second contract they would have received an average profit of $20,000 out of the same gross rentals. The New York Company would have received under the first contract $58,500, and out of the second, $40,000. Again, if 700 machines were leased, under the first contract the New York Company would have got $58,500 profits and the Vanoscope Company $28,500, while under the second contract the figures would be, respectively, $58,000 and $29,000. In short, until the rentals exceeded 700 machines, the first contract was not so good for the Vanoscope Company as the second. Thereafter the advantage to the Vanoscope Company of the first contract mounted very rapidly. Yet I cannot see how it is possible now to say absolutely whether this clause of the second contract as a whole was worse or better; obviously that turns altogether on the probability that more than 700 machines should be placed during the first seven years, or the greater part of them.

The difference is not ambiguous, however, respecting the clause regulating the returns on additional machines in subsequent years. Under the first contract there was to be an equal division of gross rentals, with the same amortization clause as applied in the case of the first 1,000 machines, if new capital should be necessary. Under the second contract the same division applied to all subsequent machines as to the first 1,000. Now there was a very

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great difference in this provision, and all to the disadvantage of the Vanoscope Company. Moreover, if the patent turned out to be a great success, the first year of its exploitation would be of trifling consequence compared with the subsequent years.

This analysis of the contracts shows, I think, that although the Vanoscope Company was better protected under the second contract, if there were 700 machines or less put out the first year and none the next, yet if the patent proved profitable the advantage would have been enormously increased to the New York Company by the change. It is quite true that the New York Company assumed no duty to make the additional machines under either contract, the right being only an option, which was expressly not to carry any liability if not exercised, yet as an option it had changed so as to be of much greater value. In explanation of this change the defendants urge that it was to fit in with the proposed contract between the Johns-Manville Company and the New York Company, by which the latter was to give up one-half of its 66⅔ per cent. so that it shared equally with the Vanoscope Company. That is true, but it should be remembered that in so doing it avoided the obligation to supply capital for manufacture and to exploit the patent. The result of its arrangements with both companies was that the New York Company would get one-third of the net profits for securing such a contract from the Johns-Manville Company. I cannot therefore see that the proposed contract with this third party helps very much to a solution of the question of fraud.

That question should be regarded in two aspects: First, whether the second contract as a whole was worse for the Vanoscope Company; second, if so, whether such a change is evidence of fraud. The first question turns upon what were the prospects of success; the change was from a priority of limited profits to a higher percentage without priority. Obviously, the choice between these two depends altogether upon what the parties thought of the certainty of success. If the patent turned out only a moderate success, the change was a benefit to the Vanoscope Company; if it would continue to be used for many years, they would be serious losers. The patent had not turned out successful hitherto; there was genuine doubt whether it could ever be made available commercially, and, if so, how profitable it would be. To say even now how much the New York Company got for what it gave up seems to me impossible. It is quite true that people do not go into such enterprises except upon the hope of great prizes, but it is equally true that they know the great prizes are necessarily contingent, and that they insist upon a discount proportionate to their risk.

But assuming that the change was for the worse, it does not by any means follow that it was the result of fraud. The Vanoscope Company was in no position to compel the New York Company to go on with the existing contract. They had failed to produce a commercial machine, and could not possibly say when such a machine would be forthcoming, or whether it ever would. The New York Company had the right to go on at the old terms if it would, or it might repudiate the contract and do what it could to recover its $50,000 out of the patent, but it certainly was not obliged to go on with the contract as it stood. This was a situation giving room for a new contract, and as such the second contract does not seem to me fraudulent or unfair. The Vanoscope Company had no capital, and no financial support; it was in trouble with Robinson who might have, and did get, a large judgment against it. Its only asset, its patents, had no value without capital, whoever owned them, Robinson or some one else; they were untried, indeed, not even adjudicated; they had been quite unsuccessful; therefore I cannot see how I am to say that the procuring of such support as the Johns-Manville Company was willing to give through the mediation of the New York Company would not have been worth two-thirds of the net profits. Without something of the sort there would have been no profits at all to divide. It does not appear that Robinson could have done better. Whatever went on in the hearts of the defendants, I can find no evidence in the case which would justify a finding of fraud in the change, and I decline to find it. Indeed, such a finding would, at most, do no more than reinstate the contract of May 9, 1914, with leave to the New York Company to manufacture as soon as it developed a commercial ma-

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chine. I do not even know whether this would suit the plaintiff, but in any case there is no evidence on which to base it.

I have preferred to consider the substance of the controversy rather than to endeavor to pick a way for the plaintiff through the legal obstacles in his path. It is extremely doubtful whether Truett's resignation can be disregarded or whether, if it can, this bill may be tacked on to the supplementary proceedings under the rule in Metcalf v. Barker, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122. Still the New York courts have at times spoken as though the supplementary proceedings were the equivalent of such a bill (Lynch v. Johnson, 48 N. Y. 27), and perhaps this bill should be taken as a continuation of the supplementary proceedings. None of these questions is involved in the view I take of the merits.

Bill dismissed, with costs.

Hector M. Hitchings, of New York City, for appellant.

Wellman, Gooch & Smyth, of New York City (William A. Redding and Frederic C. Scofield, both of New York City, of counsel), for appellees.

Before WARD and ROGERS, Circuit Judges, and MAYER, District Judge.

MAYER, District Judge. To understand clearly the questions here in issue, it is desirable to divide the controversy into two parts: (1) That relating to the effort to set aside certain license agreements; and (2) that relating to the character in law of certain proceedings following the obtaining of certain judgments by plaintiff's assignor.

[1] First. Plaintiff is the assignee of one William J. Robinson, Miriam E. Robinson, Hector M. Hitchings, and Irving E. Burdick, of their respective interests in a judgment recovered by Robinson against Vanoscope Company (hereinafter called Delaware Company. It is also the purchaser of whatever right, title, and interest the receiver in supplementary proceedings of the Delaware Company had in and to the assets of the Delaware Company. Defendants Hobbs and Hammond are officers of and stockholders in Vanoscope Company incorporated (hereinafter called New York Company), licensee of Delaware Company, by virtue of two license agreements dated, respectively, May 9, 1914, and April 10, 1915, and also licensee of defendant Continental Motion Picture Company, Incorporated, by virtue of a license agreement dated April 10, 1015. Defendant Slease died pending the action, and it has abated as to him, and defendant Van Riper was never served and did not appear. Defendant Singer is the trustee in bankruptcy of Delaware Company appointed on April 6, 1916, by the referee in a voluntary bankruptcy proceeding pending in the United States District Court for the Southern District of New York in place of a previous trustee who had resigned.

The suit is brought by plaintiff in the dual capacity of assignee of the judgment creditor and as purchaser at the sale by the receiver in supplementary proceedings.

The Delaware corporation was formed to exploit an invention for projecting moving pictures by means of revolving mirrors in such a manner as to do away with the necessity for the shutter to cut off the light between each picture.

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We are not concerned with the scientific details of the invention; suffice it to say that if the structure should be perfected so as to be commercially practicable, the patent covering the invention and here concerned may prove to be of substantial value.

Van Riper, the inventor, and Robinson, as promoter, entered into a contract on October 31, 1912, and the Delaware corporation, in which Van Riper was the controlling spirit and Robinson also entered into a contract dated January 13, 1913, the details of which it is unnecessary to set forth, the essential feature being that Robinson obtained the exclusive right to dispose of a certain amount of preferred and common stock of the Delaware Company under certain mutual terms, and the Delaware Company agreed that it would not—

"sell, assign or transfer or enter into any contract or agreement of any kind for the sale, assignment or transfer of any of the said treasury stock of said first party (Delaware Company) during the existence of this contract. * * *"

Both Robinson and Van Riper made various attempts without success to sell stock to Hobbs and Hammond, who had become attracted by the invention. About January, 1914, Robinson commenced to have differences with Van Riper and with the board of directors composed of stockholders who had bought stock through Robinson. The condition of the company was most unsatisfactory from a financial standpoint, and it practically did not have any assets except the invention, and the stockholders were not willing to add to their previous investments.

In February, 1914, Hobbs and Van Riper entered into an agreement for the sale of stock owned by Van Riper, but that agreement was surrendered by mutual consent and was never acted upon.

On March 2, 1914, Robinson commenced an action at law in the District Court for the Southern District of New York, against the Delaware corporation and Van Riper, for damages for the breach of his contracts. This action was subsequently severed by order of the District Court so that thenceforth one action was against the Delaware Company and one against Van Riper.

On April 16, 1914, an agreement was entered into between the Delaware Company and a group known as the Hammond-Hobbs-Dyer syndicate, giving them an option upon a license agreement under the patents upon payment of $50,000 prior to May 1, 1914. Under this arrangement Hobbs and Hammond were relying upon Dyer to furnish the capital and upon his failure so to do the option was canceled.

Hobbs and Hammond, however, obtained the co-operation of A. L. Garford of Elyria, Ohio, to take up the Dyer interest in the contract, and Hobbs entered into a new contract with the Delaware Company for an option for the license agreement and paid $10,000 on account of the consideration therefor.

Garford is a large manufacturer of repute, well known in the business community and having large facilities in the way of tools and machinery for perfecting an invention of the character here concerned. Meanwhile, Hobbs and Hammond had become stockholders in a New York corporation known as Vanoscope Company, Incorporated. Plaintiff contends that this company was formed as a step in a

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conspiracy in derogation of Robinson's rights, but we fail to find any evidence to sustain that contention. To carry out the proposition of Hobbs for a license agreement, the Delaware Company and the New York Company entered into a license agreement dated May 9, 1914, which was deposited with a trust company in escrow to be held by it until the completion of $50,000 advance royalty to be paid prior to the delivery thereof.

The District Judge has carefully and fully analyzed this license agreement and we agree with his conclusions in respect thereof. It is true that Hobbs and Hammond knew that Robinson had commenced his lawsuits but, in the circumstances, such a course by Robinson could not prevent the Delaware Company and outside inventors from entering into any legitimate agreement calculated to progress the development and sale of machines covered by the patents owned by the Delaware Company. Robinson, by beginning an action at law, had elected to discard any remedy in equity, if such were available to him. He was suing, not to restrain the Delaware Company, but to obtain a money judgment for damages for breach of contract. The Delaware Company was not called upon to sit still and await the result of the Robinson action, nor were Hobbs and Hammond in any manner prevented from making any fair business arrangement. The cash advance of $50,000 and the various terms of the contract as discussed in detail by the District Judge are full assurance of the integrity of the transaction, and we have no doubt as to the validity of this agreement of May 9, 1914.

On March 20, 1915, a verdict was rendered in favor of Robinson against Van Riper upon which a judgment was entered for $100,110.95 on March 26, 1915. On April 7, 1915, the trial of the action of Robinson v. Delaware Co. was begun before Judge Hough and a jury, and that trial resulted on April 12, 1915, in a verdict upon which a judgment was entered on April 16, 1915, for $190,017.98. During the progress of this trial, viz. on April 10, 1915, Hobbs, Hammond, Van Riper, Hathaway, the president of defendant Continental Motion Picture Company, Incorporated, Slease, the attorney for Van Riper and the Delaware Company, and Harding, also one of the attorneys for Van Riper and the Delaware Company, met at luncheon at a club in Broad street and discussed the modification of the agreement of May 9, 1914, and a new agreement (drawn on the evening of April 9, 1915, by Wing & Russell, attorneys for Hobbs and Hammond) was entered into on April 10, 1915. This agreement was authorized by the board of directors of the Delaware Company and duly executed. At the same time a collateral agreement between defendant Continental Motion Picture Company, Incorporated, and the New York Company was executed for the nominal royalty of $1 per machine.

The agreement of April 10, 1915, between the Delaware Company and the New York Company recited, inter alia, that the Delaware Company was the owner of the entire right, title, and interest in and to applications for letters patent filed by Magnus Smith under the serial numbers 553,805 and 820,051. The agreement between Continental Motion Picture Company, Incorporated, and the New York

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Company recited that the Continental Company was the owner of a patent issued to Smith No. 1,105,163 and of application serial number 820,051. (Note: No. 553,805 is the serial number of the application which resulted in patent No. 1,105,163.)

In addition to the Smith applications, the agreement between the Delaware Company and the New York Company covered a patent to and various applications for patents by Van Riper.

For brevity these agreements of April 10, 1915, will be referred to as one agreement, as there is no doubt on the evidence that Delaware Company was the owner of the Magnus Smith patent and application.

Before adverting to the terms of this new agreement, it is necessary to note that Harding testified that the new agreement was to be used only in case that Robinson obtained a verdict against the Delaware Company in the action then on trial. Plaintiff urges that Harding's testimony is to be accepted, and that it is confirmed by the fact that the parties must have contemplated that Robinson would gain a verdict in view of the successful outcome of the action against Van Riper.

The District Judge dealt with that contention as follows:

"The agreement of April 10, 1915, was made with a fuller knowledge, if possible, of Robinson's rights than its predecessor. The circumstances of its execution lend some color to suspicion that it was made against the possibility of a verdict. I think it was certainly made with that prospect in mind and to settle the rights which had arisen under the first contract, but I cannot accept Harding's statement that it was to be used only in case of a verdict. Some new contract was in any case necessary between the parties, and the possibility of such a one is foreshadowed as far back as the proposed contract between the New York Company and the Johns-Manville Company. Moreover, it is most unlikely that the drafting was left till April 10th, as Harding recalls; the contract is elaborate and could not be made hastily out of the earlier one. It shows evidence of much care in preparation, and bears the indorsement of Hobbs' lawyers, contrary again to Harding's recollection. However, while I reject the idea that it was intended only for such use, the time of its appearance justifies a close scrutiny of its terms in comparison with those of the earlier contract."

The District Judge then proceeded to analyze the agreement of April 10, 1915, and to point out that it was difficult to determine whether the agreement of April 10, 1915, as a whole was more or less favorable to the Delaware Company than the agreement of May 9, 1914. We agree with his conclusion that if the patent turned out only a moderate success, the change was a benefit to the Delaware Company, but that if the patent turned out successfully, the agreement in the long run would be more favorable to the New York Company and less favorable to the Delaware Company than was the agreement of May 9, 1914.

The situation must be approached from the standpoint of the surrounding and preceding circumstances. The District Judge had the advantage of seeing and hearing the witnesses, and in so far as the credibility of the witnesses is involved, we accept his conclusion. This conclusion we think was further borne out by all the circumstances. We are satisfied that up to this time the machines had not been made commercially successful. On this point the testimony of the expert Lowenstein is amply convincing, and the testimony on behalf of plain-

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tiff of the expert Berger, who had worked on these machines at the Garford factory, is really confirmatory of this view, because Berger admitted that before the machines could be made commercially useful it was necessary to introduce certain changes which Berger refused to disclose because they represented patentable differences.

The New York Company had previously (about January, 1915), through Hobbs and Hammond, taken up the question of a license arrangement and sales agency with the H. W. Johns-Manville Company, a large concern in touch with motion picture exhibitors, by reason of its manufacture and sale of certain other products needed in the motion picture business.

The evidence is fully satisfactory that Hobbs and Hammond were acting in good faith in their own interest in a situation where the future of the patents was very much in doubt, and the past experience had been very discouraging. It may be assumed that they feared that if Robinson obtained a judgment it might be difficult to deal with him, but this view is not an indication of fraud nor of any attempt on the part of the New York Company to hinder, delay, or defraud creditors, provided that the agreement of April 10, 1915, was one which did not put the property of the Delaware Company beyond the reach of Robinson, nor deal with it under such circumstances as to indicate an intent to hinder, defraud or delay.

Once it is found that the contract of May 9, 1914, was legitimate and fair, then it must follow that the modification embodied in the contract of April 10, 1915, was on all the facts and in all the circumstances fully justified; and in this connection it may be observed that there is nothing in this record which indicates that Hobbs and Hammond were in any manner in any scheme or collusive effort to deprive Robinson of any of his rights and that the acts of Van Riper and his associates hereinafter referred to are not brought home to the knowledge of Hobbs and Hammond by any evidence in this record.

The situation was that the only money in sight by which anything whatever could be done to develop the commercial success of these patent machines was forthcoming from Hobbs and Hammond, and in an enterprise which at that time was very doubtful and the future of which was speculative, it is quite plain that Hobbs and Hammond were right in insisting upon such modifications as they obtained by virtue of the contract of April 10, 1915.

We conclude, therefore, that the District Judge was right in determining not to set aside the agreements of May 9, 1914, and of April 10, 1915.

[2] Second. After Robinson obtained his judgment against the Delaware Company, execution was issued to the marshal and returned nulla bona on May 26, 1915.

The main business of the company had been conducted from its Chicago offices, where Van Riper and others interested in the company resided. One Truett was the president and a director of the Delaware Company, and he could be reached by service of process in New York City.

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On April 21, 1915, Truett tendered his resignation as president of the Delaware Company, but not as director, and the resignation was accepted at a meeting of the board of directors of the Delaware Company held on April 21, 1915.

On June 5, 1915, Robinson obtained an order for the examination of the Delaware Company in supplementary proceedings, the order requiring that the Delaware Company, judgment debtor, should appear for examination by its president, Truett, on June 11, 1915. This order was served on Truett on June 7, 1915. On June 10, 1915, the copy of the order which had been served on Truett was given to Harding by Slease or Van Riper (Harding did not recall which). Harding appeared with Truett when Truett was sworn, and did not enter any objection to Truett's examination on the ground that Truett had resigned, or that he was not president of the corporation, or that he (Harding) had no authority to appear generally in the proceeding. Harding had not received any information or intimation that he was not authorized to appear upon that examination.

On June 10, 1915, another order was made by the District Court for the examination of the Delaware Company in supplementary proceedings, this time requiring Van Riper to appear. This order was served the same day, and it is conceded that the service upon Van Riper as a director was valid service upon the company. The attorney for Robinson continued in his pursuit of the judgment debtor against obvious efforts to obstruct Robinson from collecting his judgment, until he succeeded in obtaining an order on June 21, 1915, appointing a receiver in the supplementary proceedings. It was recited in the order that "the former president and treasurer of Vanoscope Company" (meaning Truett and Van Riper) had been examined thereunder, and that notice of the motion for appointment of a receiver could not be served on any officer of the defendant in the state of New York, and that such notice of motion was dispensed with. Under section 2464 of the New York Code, at least two days' notice of application for an order appointing such a receiver must be given personally to the judgment debtor unless the judge is satisfied that he cannot, with reasonable diligence, be found within the state.

On May 28, 1915, Truett purported to resign as a director, and it is now contended on behalf of defendants that the plaintiff's argument that the service on Truett was service on the Delaware Company is inconsistent with the affidavit of the attorney for plaintiff and the order made thereon, to the effect that the notice of motion for the appointment of a receiver could not be served within the state. We do not agree with this view. The order of June 21, 1915, stands valid and unassailed. There is nothing to negative the assertion made in the affidavit of the attorney for plaintiff that it was not possible to serve within the state the notice of motion upon any officers of the Delaware Company. The Delaware Company, by reason of its conduct, cannot be heard to assert that some officer could have been served; on the other hand, plaintiff, as the owner of the Robinson judgment, is entitled to urge that the service on Truett was valid service on the company. This service upon Truett becomes exceedingly important

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for the reason that the petition of the Delaware Company in a voluntary proceeding in bankruptcy was filed on October 8, 1915. The service on Van Riper, therefore, came within the four months' period under the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544), while the service on Truett took place outside of the four months' period.[1]

From the time the judgment was entered the Delaware Company resorted to every means at its disposal to prevent the collection of the Robinson judgment. See record in Re Vanoscope Co., 233 Fed. 53, 147 C. C. A. 123.

On July 15, 1915, a special meeting of the Delaware Company was held at Chicago, the only persons present being Van Riper and one Morhardt, a man closely associated with Van Riper. The minutes of that meeting recite that it was called pursuant to a written request signed by Van Riper and Morhardt and go on to state that all of the directors and officers, with the exception of Satterfield, Morhardt, and Van Riper, had tendered their resignations, and thereupon a new board of directors was elected. The minutes also recite that the resignations of the directors and officers were accepted.

It will be noted that Truett purported to send forward his resignation as director to Morhardt as secretary of the Delaware Company at Chicago on May 28, 1915, just two days after Robinson's execution against the Delaware Company had been returned unsatisfied. It is an interesting fact that while Truett resigned as president in April, he did not attempt to resign as a director until after the execution had been returned unsatisfied as above stated. Whether this was an accidental omission in the scheme of Van Riper and his associates to evade collection of the Robinson judgment does not appear, but it would not be strange if, by some mischance, Truett had not been advised to resign as director as well as president.

We are fully satisfied from the record (exhibiting various acts unnecessary to set forth in detail) that the resignation of Truett was merely an obstructive device in fraud of Robinson to prevent service upon an officer and director who could be served within this jurisdiction, the purpose clearly being that only those who were nonresidents should remain as directors, thus leaving the difficult task of serving the order in supplementary proceedings to the chance of finding one of the nonresident directors such as Van Riper within this jurisdiction.

There are cases which hold that in the absence of statutory regulations the resignation of an officer of a corporation takes effect on his

[1] NOTE.—Section 2468 of the New York Code reads:

"The property of the judgment debtor is vested in a receiver, who has duly qualified, from the time of filing the order appointing him. * * *"

Section 2469 of the Code reads:

"Where the receiver's title to personal property has become vested, as prescribed in the last section, it also extends back by relation, for the benefit of a judgment creditor in whose behalf the special proceeding was instituted as follows:

"1. Where an order, requiring the judgment debtor to attend and be examined, * * * has been served, before the appointment of the receiver, or the extension of the receivership, the receiver's title extends back, so as to include the personal property of the judgment debtor, at the time of the service of the order or warrant."

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delivery to the proper officer of his written resignation and before acceptance thereof by the board of directors; but in these cases some remedy is sought against the director personally, and the basis of these decisions is that where a director thus resigns, the inaction or refusal of a board of directors should not impose upon him a future liability or responsibility which he does not desire to undertake. International Bank of St. Louis v. Faber, 86 Fed. 443, 30 C. C. A. 178; Fearing v. Glenn, 73 Fed. 116, 19 C. C. A. 388; Manhattan Co. v. Kaldenberg, 165 N. Y. 1, 58 N. E. 790.

There may also be cases of which Continental Wall Paper Co. v. Lewis Voight & Sons Co. (C. C.) 106 Fed. 560, is an example, where an officer or director of a foreign corporation, who intends to visit another jurisdiction, may resign in order to avoid service of a summons in a foreign jurisdiction. But the case at bar falls in that class of cases in which the courts have expressed their condemnation of proceedings by which resignations of officers or directors of a corporation are attempted in order to effectuate a fraud.

In Zeltner v. Zeltner Brewing Co., 174 N. Y. 247, 66 N. E. 810, 95 Am. St. Rep. 574, it was held that where all the officers, except the secretary, and all the directors of an insolvent corporation resigned for the express purpose of instituting an action to procure the appointment of a receiver under the New York Code, such resignations are neither legal nor effective. See, also, Ehret v. Ringler, 144 App. Div. 480, 129 N. Y. Supp. 551.

The fact that Truett's resignation as a director was to take effect immediately, and that acceptance under the by-laws of the Delaware Company might not be necessary, does not change the situation, although it appears from the minutes of the special meeting of July 15, 1915, that Van Riper and Morhardt thought that it was necessary formally to accept the resignations of the directors. But whether or not this would be so in a legitimate transaction is immaterial here; for mere forms of procedure will be disregarded if those forms are utilized to perpetrate a wrong.

We need not be concerned with a consideration of the effect of the resignation of Truett as president if he was still a director on June 7, 1915; for whatever may have been the result of his resignation as director, as between him and the Delaware Company, in their relations with each other, that resignation was futile and of no effect as avoiding the service of the order in supplementary proceedings made on June 7, 1915; and we hold that service valid as against the Delaware Company.

On October 14, 1915, the receiver in supplementary proceedings sold his right, title, and interest in and to the property of the Delaware Company, and in the list of that property were the various patents herein referred to. The purchaser at the sale was this plaintiff, and by this sale the plaintiff became the owner of the patents subject to the license agreement of April 10, 1915, and subject to the execution and delivery of such instruments as were necessary to perfect the title to the patents.

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[3] About a year later, on September 27, 1916, after a meeting of creditors had been called by the referee in bankruptcy, the trustee in bankruptcy was authorized, over the objection of plaintiff, to sell all his right, title, and interest in and to the same property which the receiver in supplementary proceedings had sold. Hathaway, the president of defendant Continental Motion Picture Company, Incorporated, was the purchaser at the trustee's sale, paying the sum of $1,000, and thereafter Hathaway released to the defendants the cause of action against them. The trustee, however, had nothing to sell, because whatever there was had previously been sold by the receiver. It is true that patents are not subject to seizure and sale on execution. Ager v. Murray, 105 U. S. 126, 26 L. Ed. 942, and there is authority to the effect that a receiver, such as one in supplementary proceedings, does not, by virtue of his appointment, acquire title to patent rights. It is, however, well settled that a court of equity may order or decree that the proper person shall execute such assignment or other instrument as may be necessary to vest the title of the patent in the person entitled thereto. Ager v. Murray, supra; Gillette v. Bate, 86 N. Y. 87.

After the sale by the receiver, there remained with the trustee only the duty of executing and delivering any and all formal instruments necessary to perfect the title of the purchaser at the receiver's sale. No demand was made by plaintiff upon the trustee so to do, but under the bill of complaint and the issues made, the court has full power to order the trustee to fulfill these formal requirements.

If there should be any question as to the necessity of the execution of such instruments by Hathaway, plaintiff is at liberty to institute such action or proceeding in that regard as it may be advised.

The result of the foregoing is that the decree of the District Court must be modified so as to decree that the trustee shall execute and deliver to plaintiff any and all assignments or other instruments necessary to vest in plaintiff the title to all property sold by the receiver in supplementary proceedings subject to the license agreement of April 10, 1915.

As thus modified, the decree is affirmed, without costs in this court or in the District Court, and the District Court is directed to make its decree in accordance herewith.

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(244 Fed. 445)

In re VANOSCOPE CO.

(Circuit Court of Appeals, Second Circuit. May 8, 1917.)

No. 258.

BANKRUPTCY ⟹260—SALE OF PROPERTY BY TRUSTEE—OBJECTION BY ADVERSE CLAIMANT.

An adverse claimant of property also claimed by a trustee in bankruptcy has no standing to object to an order directing the trustee to sell his "right, title, and interest" in the property.

Petition for Revision of Proceedings of the District Court of the United States for the Southern District of New York, in Bankruptcy.

In the matter of the Vanoscope Company, bankrupt. Petition by the Inventions Corporation, to revise an order of the District Court. Affirmed.

Hector M. Hitchings, of New York City, for petitioner.

Arthur Leonard Rosenberg, of New York City, for appellee.

Before WARD and ROGERS, Circuit Judges, and MAYER, District Judge.

MAYER, District Judge. This is a petition to revise an order of the District Court for the Southern District of New York, dismissing the petition of the Inventions Corporation, to review the order of the referee in bankruptcy, directing the trustee in bankruptcy to sell certain property claimed by him to belong to the bankrupt estate.

The estate did not have any liquid assets, and all the property to which the trustee claimed any right, title, or interest was the subject-matter of the litigation between the Inventions Corporation and Hobbs et al., defendants, 244 Fed. 430, 157 C. C. A. 56, decided herewith.

At a final meeting of creditors duly called by the referee, the trustee asked for leave to sell all his right, title, and interest in the estate of the bankrupt, which request had been duly set forth in the notice to creditors. The trustee was without funds, and was made a party defendant in the suit above referred to. The attorney for the Inventions Corporation, plaintiff in the equity suit, objected to the granting by the referee of permission to sell the trustee's right, title, and interest.

The proceedings were in all respects regular, and on the situation as it was developed before the referee he decided that it was to the interest of the estate to order the sale asked for. The trustee did not purport to sell anything, but his right, title, and interest. No rights were affected or impaired.

It was the lookout of the purchaser as to what he was buying, and he has not complained.

We are unable to find that any error was committed by the referee or the District Court, and the order of the District Court dismissing the petition is affirmed, with costs.

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(244 Fed. 446)

REECE SHOE MACHINERY CO. v. UNITED SHOE MACHINERY CO.

(Circuit Court of Appeals, Third Circuit. July 30, 1917.)

No. 2250.

PATENTS ⟹328—INFRINGEMENT—STOP MOTION.

The Goodyear patent, No. 818,159, for a stop motion for high-speed machines, especially designed for use on power sewing machines, is limited by the proceedings in the Patent Office to a mechanism for effecting a stop which is predetermined, automatic, and machine-controlled. As so construed, *held* not infringed by a machine in which the stop mechanism is manually controlled by the operator.

Appeal from the District Court of the United States for the District of New Jersey.

Suit in equity by the Reece Shoe Machinery Company against the United Shoe Machinery Company. Decree for defendant, and complainant appeals. Affirmed.

The following is the opinion of Haight, District Judge, in the court below:

This is a suit for infringement of patent No. 818,159, issued to William E. Goodyear on April 17, 1906, and now owned by the plaintiff. Both plaintiff and defendant, as their corporate names indicate, are engaged in the manufacture of shoe machinery. It is claimed that one of the machines manufactured and marketed by the defendant infringes the machine of the patent. It may be noted at the outset that it is not claimed that the plaintiff's commercial machine embodies the novel features of the patent, except that, as plaintiff's expert testified, it has some of the latter's "broad or general features"; the former being designed in accordance with patent No. 1,085,093, issued to A. R. Schoenky on January 20, 1914. According to the testimony of the president of the plaintiff company, the patent in suit was first brought to plaintiff's attention in the "spring of 1914," when it was engaged in developing its commercial machine, and was purchased because plaintiff was advised that it was "important" that it should own the same "to protect" its machine. The patentee was thereupon looked up. It was actually acquired from the patentee on April 10, 1914, by the Reece Buttonhole Machine Company, a concern closely affiliated with the plaintiff and engaged in manufacturing machines for which the device of the patent was primarily designed. It was, however, never used by that corporation. As far as the evidence shows, it was assigned by it to the plaintiff on May 1, 1914. On June 3d of that year this suit was instituted. For all that appears, it is a mere paper patent, never having been put to any practical use, although the patentee was at the time it was issued an employé of the Singer Sewing Machine Company. The object sought by the patentee, as set forth in the specifications, was "the production of stop motion for high-speed machines which will positively stop the mechanism at a predetermined position and without shock." Although the device was stated to be intended for use in connection with sewing machines, and particularly buttonhole sewing machines, the patentee claimed that it might be applied to any other form of sewing machines or to any machine to which the stop motion might be used "with advantage." The result accomplished, as stated in the specifications, is that the machine "may be gradually started and positively stopped, but before stopping its speed will be reduced so that the action of stopping will be without shock." Broadly stated, the device consists in attaching to a sewing machine two pulleys, connected by a system of planetary gears with the working shaft, which are designed to be operated by a single belt connected with the power source; the belt being shifted from one pulley to the other by a belt shifter, which operates automatically through a

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series of levers; the latter being operated and controlled by a cam carried on a disk, which, in turn, is operated by the working shaft. In the particular device described in the specifications the disk is designed to make one revolution to a predetermined number of revolutions of the working or driven shaft. When the machine is at rest, the belt is connected with one of the pulleys which revolves idly, but when the belt is shifted to the other pulley, it operates both pulleys through the system of planetary gears, and the machine is then run at high speed. When the driven shaft has made the required number of revolutions and thus rotated the disk, the cam, through the levers, causes the belt shifter to shift the belt to the first mentioned pulley, and at the same time brings into play a brake which frictionally engages a collar connected with the second pulley, and thus holds the latter stationary. The effect of this, through the planetary gears, is to cause the first-mentioned pulley to operate the machine at a low speed, which bears a fixed relation to the working or high speed. After the driven shaft has made a given number of revolutions at a low speed, and has thus moved the disk and the cam further in their annular course, the cam, through the series of levers before mentioned, releases the brake from the second pulley, and thus disengages the low speed, and at the same time throws a dog stop, located on one of the arms of one of the levers, into engagement with a projection on the working shaft, and thus brings the whole machine to a positive stop at a predetermined position. It will be noted from the above description, brief and inartistic as it is, that the disengagement of the high speed and the introduction of the low does not depend in any way upon the action of the operator, although, conceivably, he could control them by keeping the pedal depressed so that the cam could not work until he saw fit to release the pedal. But in a machine to which the mechanism of the patent was primarily designed to be applied—a buttonhole sewing machine—it is not ordinarily desirable that the operator should exercise any control over the stoppage of the machine after he has once set it in motion, because the machine is designed to work around a buttonhole, and thus make a predetermined number of stitches and come to a stop. The defendant's machine, on the other hand, is designed and useful only for stitching the outsole to the welt of a shoe. As such work requires that the speed of the machine shall differ as to certain parts of the work, for instance, around the toe and along the ball of the shoe, it is necessary that the speed shall at all times be under the control of the operator and be variable. Moreover, as the sizes of the shoes to be sewed vary, it is also necessary that the stoppage of the machine shall be under the control of the operator. In these two respects, it will thus be seen, a buttonhole sewing machine and a machine such as defendant's materially differ. The variable speed feature of the defendant's machine is produced by a friction clutch, to which the operating treadle is connected, which permits the operator, by varying the pressure on the treadle, to produce a variable speed, dependent upon how firmly the faces of the friction clutch are pressed together. The degree of the speed is therefore entirely under his control at all times, and the machine can be stopped only by releasing the treadle or pedal. It is also important that the defendant's machine stop without shock and with the needle out of the work, as it is likewise in a machine such as the device of the patent was primarily designed to be attached to. To accomplish these latter purposes the defendant has incorporated in its machine the mechanism which the plaintiff alleges infringes certain claims of the patent in suit. This mechanism is, briefly, as follows: Attached to the main power shaft (to which also is connected the friction clutch through which power is transmitted to the driven or working shaft) is a pulley which revolves continually at a constant speed. This is connected by a belt with another pulley, which, in turn, through a shaft and worm gear, operates a worm wheel; the latter being loose on the working or driven shaft. Hence this worm wheel is always turning slowly, irrespective of whether the variable speed is in action or not, and at a constant speed. It has an internal cone friction face, which is designed to receive a cam wheel, having an external cone friction face, coupled to the driven shaft, so as to rotate therewith, but free to slide, to a certain extent, laterally thereon. While the high or working speed is on, this cam wheel rotates idly with the shaft

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and performs no function. Extending around the shoulder of the cam wheel is an inclined or tortuous groove or track in which a cam roll is designed to travel. The latter is attached to one of the arms of a two-armed pivoted lever, the other arm of which is designed, by means of a socket at the end thereof, to engage a bolt which, through a system of levers, is connected with the treadle, and hence is under the control of the operator, being either depressed or permitted to rise, as he wills.. While the bolt is held depressed, the two-armed lever and the cam roll simply vibrate and perform no function. However, when the bolt rises and registers with the socket, the lever is held stationary, with the result that the cam roll, when it meets the incline of the cam track, forces the exterior friction face of the cam wheel into engagement with the interior friction face of the worm wheel. Thereupon, the high or working speed having been disengaged by the releasing of the treadle, and the constant speed being continually in operation, the driven shaft to which the cam wheel is attached is operated at the constant speed of the worm wheel, until the cam roll has passed over the incline in the cam track, when the cone faces are brought out of frictional engagement, and the main shaft, being without power, revolves only through momentum. At the same time that the constant speed is disengaged a brake, through a series of levers operating through the cam, is applied to the main pulley connected with the driven shaft, and a dog stop comes into engagement with a projection on the main shaft and positively stops the machine, in case the brake has not already done so. It is thus obvious that the cutting off of the high speed is not dependent on the action of the cam, but solely on the will of the operator, as, in a broad sense, is also the introduction of the constant speed. In fact, the operator, after cutting off the high speed, may allow the machine to come to a stop without the introduction of the constant speed; the main shaft can make no more than 1⅓ revolutions, and ordinarily does make only a fraction of a revolution. Both mechanisms are designed to effect a stopping of their respective machines by the introduction of a low speed between the cutting off of the high and the final stop. The essential difference between the stop mechanism of the patent as described therein, and that of the defendant's machine, is in the method by which they are respectively set in operation. The defendant contends, however, that there are other differences, besides those of mere form, which negative infringement. But if I were compelled to rest my decision upon any of them, I would have great hesitancy in finding that any, save possibly that relative to the character or functions of the respective cams, have that effect. To so hold would require a more narrow and restricted construction to be given to the claims in suit than I am inclined to believe is warranted. The difference before mentioned is, however, vital, and, unless the claims in suit are entitled to a construction such as the plaintiff contends for, it is decisive. The claims alleged to be infringed are the first seven, 21, and 31. They can best be set forth by quoting No. 2 and pointing out the important differences, other than mere variations of expression, between it and them. It is as follows: "A stop motion, wherein means are employed to automatically reduce the speed of the machine before stopping it, and to continue the engagement of the driving power after the speed is reduced, such means being controlled by the machine."

Claim 1 uses the expression "means for positively driving it at a reduced speed to a predetermined stopping position," instead of the expression of claim 2 "to continue the engagement of the driving power after the speed is reduced." In other respects it is the same. Claim 3 contains the additional element "of means for driving the shaft at high speed" and "means for positively stopping the shaft." The expression of means "to automatically reduce the speed" is not used in this claim, or in 4, 5, or 6, but in each there is an element of means "for automatically (in some claims 'positively,' also) driving the shaft at a reduced speed, such means being controlled by the driven shaft" or "driven member." Claim 4 requires, in addition, means for "positively" driving the shaft at high speed, and the means for automatically driving it at a reduced speed are limited by the expression "to a predetermined stopping position." In other respects it is the same as claim 3. Claim 5 requires that the means for driving the driven member at high speed shall

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be "disengageable"; also that there shall be means for "stopping the driven member," which shall comprise "means for automatically operating the driven member at a reduced speed." In other respects material to this inquiry it is the same as claim 3. Claim 6 requires a "positive stop" and "means for applying the stop after the driven member has been moved to a predetermined stopping position." The remaining three claims are more restricted than those just analyzed. They will be discussed hereafter. It will thus be noted that each of the first six claims requires either that there be "means for automatically reducing the speed of the machine (the driven member or driven shaft)" before stopping it, as in claims 1 and 2, or that there be "means for driving the shaft at a high speed" and "means for automatically driving the shaft (driven shaft or driven member) at a reduced speed," as in claims 3, 4, 5, and 6. It is also a requirement of each of these claims that the means for automatically reducing the speed or driving the driven shaft at a reduced speed, as the case may be, shall be "controlled by the machine," or the "driven shaft," or "driven member," according to the particular expression used. The word "automatically" and the element last mentioned were only inserted in the claims after the Patent Office had refused to allow them in their original form. The Mills patent, No. 728,269, covering a stop mechanism for sewing machines, was first cited against them. In an argument presented to the Commissioner of Patents the pertinency of this reference was contested on the ground that the stop motion of that patent would not "positively stop a machine at the desired position and without shock, for its operation entirely depends on the varying friction of a brake." It was also said that in the invention of the patent in suit the brake shoe did not stop the machine or have anything to do with stopping it, but that it was "a portion of the change speed mechanism." However, the claims were again rejected, but this time not on Mills, but on Richardson patent, No. 710,612, covering a shoe-sewing machine. The machine of this latter patent was fitted with a high and low speed mechanism, which would not permit the high speed to be thrown out without the low speed being thrown in, although it is conceivable that they might occur almost simultaneously. But the introduction of the low speed did not automatically bring the machine to a stop after a predetermined number of revolutions or otherwise, it being necessary for the operator to put additional mechanism (although a part of the change speed mechanism) into operation to effect stoppage. The change of speed was also under the control of the operator and dependent upon his action. However, when he disconnected the high speed, the low, immediately and without further action on this part, was thrown in, unless he completely released the pedal in the first instance, when the dog stop happened to be in a given position, in which case the low speed would really not take effect so as to make any appreciable difference in the stoppage operation, and the machine would be brought to a stop abruptly. That machine was designed to do exactly the same kind of work as the defendant's machine. The patentee then and without further argument amended the claims by inserting the word "automatically" in each of the first six claims (claim 2 having been added at the time of the first rejection). In the argument to support the allowance of the claims as thus amended it was said: "The first six claims have been amended to specify an automatic arrangement for driving the machinery at a reduced speed. The Richardson structure is not automatic. The shifting from one speed to the other is effected by means of a pedal." The claims in question were, however, again rejected on Richardson, the examiner, holding that the stop mechanism of that patent was automatic, because after the operator had removed his foot from the treadle the machine would automatically stop after a certain time. The patentee, while not admitting the correctness of that ruling, amended the claims by inserting the clause "such means being controlled by the machine" or "driven shaft" or "driven member," as the case may be. It was expressly stated that the last amendment was made in order to make the meaning of the word "automatic," as used in the claims, clear. Without attempting at this time to recite all of the argument then advanced to show that the Richardson device was not automatic, suffice it to say that a distinction was drawn between a "speed-shifting" mechanism controlled by the operator and one controlled by the "driven member" or "driv-

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en shaft." The claims were thereupon allowed. It will be noticed that the first two claims call for "means for automatically reducing the speed," while the next four do not in so many words, but require "means for automatically driving the shaft at a reduced speed." While the last four do not therefore expressly require as one of their elements the automatic introduction of the low or reduced speed, as the first two necessarily do, yet I think it clear that they impliedly do so. They each expressly require means for driving at a high speed and at a low speed. The use of the word "automatically" in connection with the means for driving the shaft at a reduced speed, when considered in the light of the Richardson patent, the other element of high-speed drive, the specifications, the fact that the means for driving at slow speed are to be controlled by the driven member, and that the patentee's solicitors, in their arguments before the Patent Office, insisted, as respects all of these claims, that the Richardson patent was not automatic because "the shifting from one speed to the other is effected by means of a pedal," and later, when explaining the meaning of "automatic," said that "the speed shifting means is controlled by the driven member," seems to necessarily imply that it was intended to include in the "means for operating at a reduced speed," at least the automatic throwing in of the low speed. If this is not the proper construction, the word "automatically" is mere surplusage; for the machine would necessarily continue to operate at the reduced speed so long as power was applied, after it had once been set in operation. Indeed, I do not think this conclusion is controverted. Therefore, for the purposes of the present inquiry, as will appear when the contentions of the respective parties are stated, there is no essential difference between any of the first six claims.

The plaintiff contends that the claims in question should be construed as applying only to the operation of the stop-motion mechanism after it has once been started, and as having nothing to do with its initiation—the throwing out of the high speed. Hence it is argued that the defendant's machine infringes because, after the high speed is disengaged, although this must be done by the operator, the stop motion is automatically initiated and thereafter controlled (i. e., the low speed thrown in and the machine operated at a reduced speed) by means which are the same or the equivalent of those of the patent (i. e., by the cam on the driven shaft). This conclusion would probably be sound if the premise were correct. The defendant, on the other hand, contends that a proper construction of the claims will not permit the elimination of the throwing out of the high speed, but that they must be construed to cover all movements from the throwing out of the high speed to the disengagement of the low. Hence it is insisted that the defendant's machine does not infringe, because the cutting off of the high speed is not automatic, but wholly under the control of the operator and dependent upon his action, as is also the introduction of the low speed. The decision of the question of the infringement of the first six claims depends, therefore, upon whether these claims are to be construed as applying simply to a mechanism which initiates a reduced speed after the high speed has been cut off, or whether they must be construed to include the whole series of mechanical actions necessary to effect a reduced speed, which, of course, must include the elimination of the high. That they cannot be properly given the construction that the plaintiff contends for seems to me clear. It will be borne in mind that the throwing out of high and the throwing in of the low in the machine of the patent, as described in the specifications, is accomplished wholly by the action of the cam on the driven member, whereas in defendant's machine the cam has nothing whatever to do with throwing out of the high speed; this being accomplished entirely by the operator, as in the Richardson patent. It is true that in the defendant's machine, if the operator completely removes his foot from the pedal at the same time that he disengages the high speed, the low speed will automatically take effect, as soon as the bolt registers with the socket on the two-armed lever, which carries the cam roll, and the latter has come in contact with the inclined part of the groove. In that sense the introduction of the low speed does not depend upon the action of the operator, but it is equally true that until the operator allows the bolt to rise and register with the socket the low speed will not take effect. It is clear, therefore, that

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if the claims are to be construed as covering a mechanism substantially that described in the specifications, the stop mechanism of the defendant's machine is radically different from that of the patent. Plaintiff contends, however, that the claims should not be so limited, because the stop mechanism there described is that applicable only to a buttonhole sewing machine, which, as before stated, makes a predetermined number of revolutions, and that when applied to a machine which does not have that feature (the patent, by its terms, being applicable to any other form of sewing machine) it would manifestly require some action on the part of the operator to set the stop motion in operation, and hence that a construction should be given which will embrace the latter type of machine. With this construction I am in accord, providing it is possible to so construe the claims, and not at the same time cover an invention which the patent does not disclose. Merely because the specifications of a patent claim that the invention is applicable to machines other than that specifically mentioned does not make it so. It may be observed at the outset that it seems impossible to conceive of a stop mechanism which does not include a means for the throwing out of the high speed; for until the high speed is eliminated no stop motion can be put in operation. The throwing out of the high speed may be done automatically by the machine, as described in the specifications of the patent in suit, or by the action of the operator in releasing the pedal, as in the defendant's machine. As before shown, the claims of the patent require that the introduction of the low speed shall be automatic. Can the claims, however, in the light of the specifications, the prior art. and the patentee's own interpretation of the meaning of the word "automatically," as used therein, when prosecuting the claims before the Patent Office, be construed as entirely eliminating the high-speed throwout? Such a construction would disregard the "speed-shifting" feature, which is the very thing which the patentee contended before the Patent Office was, in his mechanism, automatic, and which in Richardson was under the control of the operator. In his last argument he said "the speed-shifting means is controlled by the driven member" and thus "the definition of 'automatic' is made very clear." Speed shifting necessarily implies a change from one speed to another. Such change, according to the patentee, was to be automatic—i. e., controlled by the driven member. A change of speed which does not eliminate one speed before introducing another is inconceivable. Further, in defining why the Richardson machine is not automatic, he said that, if the operator should take his foot off the pedal when the machine was running at a high speed, the stop would be put on before the driven shaft could make a complete revolution, and therefore the effect of the low speed would not be secured. In the machine of the patent, if the operator should keep his foot on the treadle, so that the cam could not work until the treadle was released, and if at the time the cam was in such a position as to immediately release the actuating lever, and thus simultaneously throw out the low speed, there would be the same result as the patentee pointed out in respect to the Richardson patent; for in that case, the machine would be brought to a stop by the disengagement of the high speed without the low having really taken effect at all. It is only when the cutting off of the high speed and the introduction of the low is placed under the control of the machine and taken out of the control of the operator entirely that the machine of the patent will produce the result which the patentee claimed differentiated it from and made it more desirable than the mechanism of Richardson. If the high speed cut-off is no part of the stop motion of the patent, why was "means for driving the member at high speed" included as an element in every claim in which "means for automatically reducing the speed" was not present? Means for reducing speed necessarily presuppose that a high (in a relative sense) speed precedes the reducing process. As before stated, such a process which does not include the elimination of the high speed is not readily imaginable. While I do not find it necessary to hold, as the defendant seems to contend, that the claims should be construed to cover only a mechanism in which the number of revolutions which the driven shaft is to make has been predetermined, therefore excluding any act of the operator after the machine has once been set in operation, still, for

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the reasons before stated, I think they must be construed to exclude a mechanism in which the cutting off of the high speed is not accomplished by machine, but directly by the operator. For instance, if in the device of the patent the treadle were released shortly before the cam came in position to actuate the series of levers, the cam would then throw out the high speed, introduce the low, and operate the machine for a certain number of revolutions at a reduced speed, and then disengage the latter. But in such a case the cutting off of the high speed, and so forth, would be automatic in the sense that the cam on the driven member would actuate the machinery necessary to accomplish this result. Such a mechanism would be different from that of Richardson, because in the latter the action of the operator directly disengages the high speed, whereas in the mechanism of the patent he would simply set in operation certain mechanism which, after a given time, would disengage the high speed. There is thus a conceivable distinction, fine though it is, between Richardson and the device of the patent, if the latter is construed to cover a mechanism in which the operator does something more than start the machine in operation. But this very distinction also applies to the defendant's machine quite as forcibly as it does to Richardson. Consequently it seems clear, whether the claims of the patent are to be considered as applicable only to the device described in the specifications or as to one such as I have above supposed, that they must be construed as covering only a mechanism in which the throwing out of the high speed, and hence the introduction of the low is controlled by the machine as distinguished from the operator. As the defendant's stop mechanism is not automatic in that sense, it follows that it does not infringe these claims. The importance which I have attributed to the arguments of the patentee's solicitors, which appear in the file wrapper, is not opposed to the rule that a fair construction shall be given to the claims as actually granted, although limitations have been inserted therein by amendment. Hubbell v. United States, 179 U. S. 77, 80, 21 Sup. Ct. 24, 45 L. Ed. 95. The word "automatic" and the clause "such means being controlled by the machine" or "driven member," etc., were express limitations, and the patent can receive no construction which would nullify them or either of them. I have simply resorted to the file wrapper to ascertain the meaning which should be given them. Certainly a fair construction would not be one at variance with the sense in which they were understood by both the patentee and the Commissioner of Patents. Their meaning as used is certainly ambiguous, especially in view of the plaintiff's contentions. In addition, while the patent in suit is not invalid simply because it is a paper patent, and while it is entitled to the benefit of a fair range of equivalents, yet, being a paper patent, it is not entitled to a construction broader than the claims clearly require or than the invention which is clearly disclosed therein. Bradford v. Belknap Motor Co. (C. C. Me.) 105 Fed. 63, 64; Boston, etc., Rubber Co. v. Pennsylvania Rubber Co., 164 Fed. 557, 90 C. C. A. 84 (C. C. A. 1st Cir.); Lovell v. Seybold Mach. Co., 169 Fed. 289, 290, 94 C. C. A. 578 (C. C. A. 2d Cir.); Westinghouse, etc., Co. v. Toledo, etc., Co., 172 Fed. 371, 372, 97 C. C. A. 69 (C. C. A. 6th Cir.); Kestner Evaporator Co. v. American Evaporator Co. (C. C. E. D. Pa.) 182 Fed. 844, 846. See, also, remarks of Mr. Justice Brown in Deering v. Winona Harvester Works, 155 U. S. 295, 15 Sup. Ct. 118, 39 L. Ed. 153. I have made no reference to either the Shearn patent, No. 728,775, or to the Hartford patent, No. 579,870, which are also relied upon by defendant, and which, I think, are not without some pertinency on the question of construction of the claims. Claim No. 7 was inserted at the time of the last amendment to the other claims. It contains as an element "means for automatically reducing the speed of a machine a predetermined number of revolutions before stopping." Passing the question as to whether the defendant's machine, within the meaning of the patent, reduces the speed "a predetermined number of revolutions before stopping," this claim is not infringed, because, for the reasons before stated, the defendant's machine has no means for "automatically" reducing its speed within the meaning of the patent. The word "automatically" is not found in claim 21, but that claim does contain as elements: (1) "Means for positively rotating the shaft (driving) at the working (high) speed;" (2) "means for

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rotating the shaft at a slower speed;" (3) "means for stopping the shaft;" and (4) "the last two means being controlled by the movements of the cam." The cam is not required to be attached to the shaft, but is merely to be "moving in time therewith." It would seem that the last element impliedly includes an automatic speed-shifting feature such as the other claims, although possibly of a more limited nature. That the speed-shifting feature shall not be under the control of the operator is of the very essence of invention. The patent is not entitled to a construction broader or different than the invention disclosed therein. As before pointed out, defendant's machine does not have that feature. Unless the claim is construed in this light, it would seem to be within the Richardson patent. In addition, I think that it is anticipated by the Shearn patent. The latter has all of the elements of the claim. Admittedly claim 31 is not infringed, unless the element of the "lever carrying means for applying the brake" refers to the overhanging end of the lever, of the machine of the patent, which has the notch adapted to engage with the projection on the driven shaft and stop the machine. The specifications make no mention of the overhanging projection of this lever having any braking or other effect whatever. The only "brake" referred to in the specifications is that which arrests the progress of the high-speed pulley, and which is spoken of as a "brake shoe." It would be quite unjustifiable to read into the paper patent, for the purpose of spelling out an infringement, a function of one of the parts to which the patentee made no reference in his specification. Ball & Socket Fastener Co. v. Kraetzer, 150 U. S. 111, 117, 14 Sup. Ct. 48, 37 L. Ed. 1019. In addition, if the construction contended for by the plaintiff is correct, it is indeed strange that the lever would not have been described as having itself a braking action rather than as one "carrying means for applying the brake." The latter expression in itself indicates a separate and distinct piece of machinery. I think it clear, therefore, that this particular element refers, not to this overhanging projection, but rather to the roller, which puts into operation the brake, which, in turn, arrests the progress of the high-speed pulley. But that brake, as the patentee, in his argument before the Commissioner respecting the pertinency of the Mills patent, distinctly said, has nothing whatever to do with the stopping of the machine, but is "a portion of the change speed mechanism." Construed in this light, the defendant's machine has no such element or counterpart. The brake on the defendant's machine has nothing to do with the change of the speed mechanism, but comes into play only after the low speed has been thrown out and for the purpose of stopping the machine.

As before stated, I have not attempted to discuss all of the differences between the defendant's machine and that of the patent which the defendant contends negative infringement, or the arguments advanced on its behalf in respect to lack of novelty, because it seems to me that the case may be properly disposed of on the points heretofore discussed. My conclusion is that the bill should be dismissed with costs.

Rogers, Kennedy & Campbell, of New York City (Livingston Gifford and Donald Campbell, both of New York City, of counsel), for appellant.

Frederick P. Fish, Alfred H. Hildreth, and J. L. Stackpole, all of Boston, Mass., for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below the Reece Shoe Machinery Company, the owner of patent No. 818,159, granted April 17, 1906, to William E. Goodyear, for a stop motion for high-speed machines, charged the United Shoe Machinery Company with infringement. On final hearing that court held infringement was not

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established. From a decree dismissing its bill, the plaintiff took this appeal.

Having had the benefit of a full and helpful discussion of this case by competent counsel, and after careful study of the briefs and records, we see no reason to differ from the conclusion reached in the court below. In view of the thorough and painstaking discussion by the judge, an opinion by this court describing the complicated machines involved could but be an effort to state in different language what has been already placed on record in the opinion of the judge below. We avoid useless repetition by reference to that opinion, and limit ourselves to a general statement of the conclusions to which we have been led by our study of the case. Those conclusions may be thus summarized:

First. The general subject here involved is the abrupt stoppage of sewing machines driven at high speed.

Second. In such machines there are two varieties and two modes of operation, viz. a cyclic machine, or one that repeats a certain unvarying routine in each operation, and therefore automatically stops at a predetermined point after sewing a certain number of stitches at uniform speed. The other is a noncyclic machine in which there is no cyclic finish and cyclic repetition, but which sews at varying speed and with varying numbers and lengths of stitches, all at the will of the operator.

Third. In the first type there is a machine-controlled, automatic, predetermined stop. In the other the stop is made when the operator wills.

The device of Goodyear was of the former kind, and in his specification he applied it to a machine for sewing the edges of buttonholes. In that respect his specification says:

"The object I have in view is the production of a stop motion for high-speed machines, which will positively stop the mechanism at a predetermined position and without shock. The invention is intended for use in connection with sewing machines, and particularly buttonhole sewing machines, which must be stopped in a certain and definite position. The invention, however, may be applied to other forms of machinery, as is found desirable. * * * It is to be understood that the illustration of this particular sewing machine [E. B. Allen, patent No. 785,061, of March 14, 1905] is solely for the purpose of describing the invention, as the invention of the stop motion may be applied to any other form of sewing machine or to any machine to which the stop motion may be used with advantage."

Showing the cyclic type of the device and the machine-effected, automatic stop, the specification says:

"A cam, *5*, carried by a disk *6*, which is turned by the machine and which makes one revolution while a buttonhole is being completed, is provided. This cam is designed to engage with mechanism for shifting the belt from one pulley to the other and applying the stop motion."

Without entering upon a detail description of the various operative parts, it suffices to say that the cyclic operation centers in said cam, *5*, which is illustrated in this drawing,

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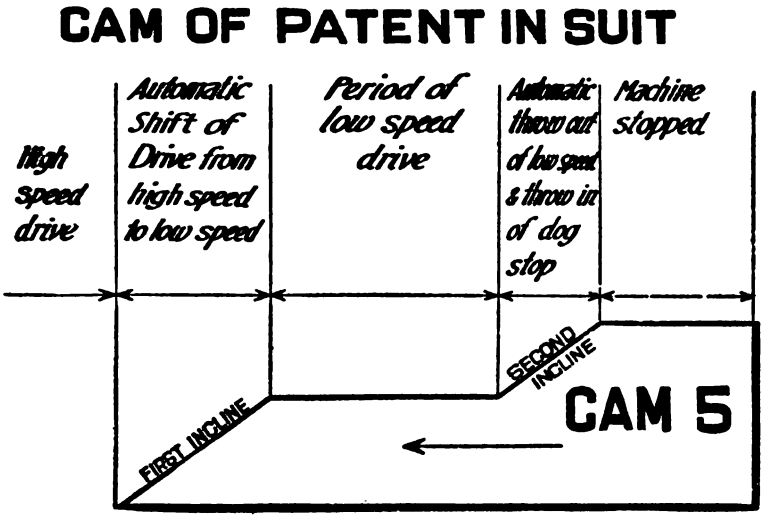

—and that by the engagement of a finger with the cam there is in the mount on the first incline an automatic, predetermined shift from high to low speed. This is followed, on the level plane, by a predetermined period of low speed. Then follows, by the mount on the second incline, an automatic, predetermined throwout of the low speed and the automatic throwin of the dog stop at a predetermined, unvarying point. It will thus be seen that the cam and engaging finger produce a continuous, indivisible, mechanical operation by which the machine automatically goes from high to low speed and from low speed to a predetermined, regularly recurrent stop.

In the progress of Goodyear's application through the Patent Office, his claims were rejected on reference to patent No. 710,612, of October 7, 1902, to Richardson, for a shoe-sewing machine. Without describing the mechanism of that machine, it suffices to say it had a high-speed drive, a change from high speed to low under the control of the operator, and thereafter an operative stop at a desired, predetermined position. Goodyear recognized that Richardson embodied his pending claims,[1] and he therefore differentiated his device by showing that Richardson's shift speed was made by the operator while his own was automatic and made by his machine, and narrowed his claims by limitation to automatic action. In that regard the file wrapper shows Goodyear said:

"The first six claims have been amended to specify an automatic arrangement for driving the machinery at the reduced speed. The Richardson structure is not automatic. The shifting from one speed to the other is effected by means of a pedal."

[1] E. g., claim 1: "A stop motion wherein means are employed for reducing the speed of the machine before stopping it and means for positively driving it at a reduced speed to a predetermined stopping position."

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Even this amendment, viz. by inserting the limitation automatically, did not satisfy the Office, and to meet its further objection Goodyear added to his claim the limitation "such means being controlled by the machine," saying:

"By including in the claims the specific statement that the speed-shifting means is controlled by the driven member, the driven shaft, or whatever is specified in the claims, the definition of 'automatic' is made very clear."

The result was to make the claim read as follows, the words in italics being those thus added under stress of the Office's insistence:

"A stop motion, wherein means are employed for *automatically* reducing the speed of the machine before stopping it, *such means being controlled by the machine*, and means for positively driving it at a reduced speed to a predetermined stopping position."

From this it will be seen that Goodyear's machine was a routine, cyclic one, and that means controlled by the machine automatically stopped it at a predetermined point. The particular machine used by Goodyear shows that his type of stop motion was applicable to a buttonhole sewing machine, and the stop requirements of such a machine illustrate generally the scope, character, and limitations of Goodyear's stop motion. As the machine was operated at high speed —some 1,500 stitches a minute—and as the stitches in the buttonhole were confined to a certain number, it is obvious that mechanically the machine was intended to automatically stop when the required buttonhole stitches were made, and the high speed of the machine mechanically required that at that instant the cycle-ending stop be made by the machine itself. To have allowed the sewing to have gone further would have ruined the buttonhole, and to have the stop made by the operator, if indeed it could be made even by a highly skilled operator at such speed, would have been a backward step in the developed buttonhole sewing art.

It will therefore be seen that in the statements of the specification, in the enforced limitation of the claims, and in the everyday working of the art, the Goodyear disclosure was for a stop that was predetermined, automatic, and machine-controlled. Moreover, as Goodyear's device was never used in practice, and left no impress on the art, there was no occasion for the exercise by the court below of that liberality of claim construction made where a highly meritorious invention might otherwise be shorn of patent protection by the literalism of a claim.

Turning, therefore, from this claim-restricted and unused device of Goodyear's to the defendant's sewing machine, we have one that does a type of nonuniform work, namely, the stitching of shoe soles, which necessitates the judgment and absolute control of an operator. It is also to be noted that the machine of the defendant has been in wide, general use, without patent challenge, and it was only after a rival manufacturer purchased the dormant Goodyear patent that this belated charge of infringement is made. Without entering into the details of the defendant's machine, we may say that it is used for sewing the soles of shoes; that such soles differ in size; the sewing is done by a skilled operator who slows down the speed as he turns bends and uses stitches of different length at different parts of the

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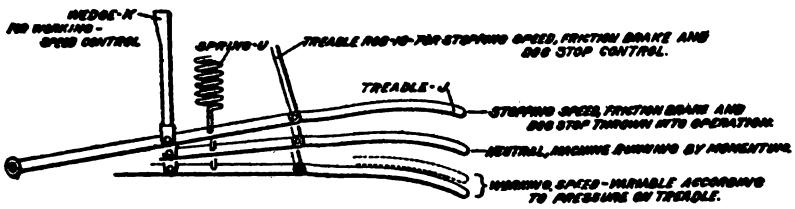
sole. In the nature of things, there must be operator control, operator skill, and operator volition in defendant's machine. In the nature of things, there can be no fixed number of stitches, no uniformity of speed, and no predetermined place or time of stop. Not only the absence of an automatic, machine-controlled stop in defendant's machine, but the varied character of the work done, precluding the possibility of the use of a predetermined stop, unite to make the defendant's machine of a wholly different type from Goodyear's. The mere fact that defendant's machine goes from high speed to low speed and that the needle stop is made at such low speed does not stamp the stop motion as Goodyear's. He has no claim, and in the nature of things he could have none, for the mechanical step of slow-speeding a machine before dog-stopping it. That is a mechanical practice and truism as old as physics, and which no patentee could monopolize. Of such speed reduction the defendant avails itself to stop its machine without shock, but this it had the right to do. It is also true that its machine is stopped when the needle is out of the fabric, and in that sense the stop is predetermined. But it will be observed that, while the mechanism is such that when the machine does stop the needle shall be in a certain relation, still this fixed condition when the operator chooses to stop it is a wholly different mechanical feature from a machine automatically stopping itself at a predetermined cyclic point. In the one case the automatic, machine-controlled stop is unchangeable; in the other the optional, human-controlled stop is variant. In both there is slow speed and a superfabric needle stop, but Goodyear did not disclose or claim a slow speed stop of a needle in a superfabric position. Confining ourselves to the foot brake mechanism of defendant's machine, its working will appear from the accompanying sketch.

Defendant's Machine
Treadle control.



Starting with the machine at such working high speed as the operator desires, he releases his foot treadle, and thereby disengages a clutch through the engagement of which the high-speed driving device drives the main shaft. But even such disengagement of the high-speed clutch does not per se throw in the low-speed clutch; for the operator may allow the machine to run by momentum. To throw in the low-speed clutch, the operator must release the treadle still further. It will thus appear that, while the throwing out of the

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high speed is a condition precedent to throwing in the low speed, it is not the causal agency, but the operator is, of throwing in the low speed. It follows, therefore, that the shift from high speed and the shift to low speed in the defendant's machine have no dominant or servient relation to each other as they necessarily have in the Goodyear cam, but that between the two independent speeds stands the personality and dominant volition of the operator.

After full consideration we are of opinion that, passing the question of validity, on which we express no view, the charge of infringement has not been established, and the decree below must be affirmed.

(244 Fed. 458)

BUTTERICK PUB. CO. v. PEERLESS PATTERN CO.

(Circuit Court of Appeals, Second Circuit. May 8, 1917.)

No. 226.

PATENTS ⟹328—INVENTION—PATTERNS FOR GARMENTS.

The O'Loughlin patent, No. 632,361, for a pattern for garments, having the sheets representing different parts of the garment designated by numbers or other characters, made by perforations, by which they may be transferred to the cloth, *held* void for lack of invention, in view of the prior art.

Appeal from the District Court of the United States for the Eastern District of New York.

Suit in equity by the Butterick Publishing Company against the Peerless Pattern Company. Decree for defendant, and complainant appeals. Affirmed.

The following is the opinion below, of Veeder, District Judge:

This is a suit by the Butterick Publishing Company against the Peerless Pattern Company for infringement of patent No. 632,361, granted to R. S. O'Loughlin September 5, 1899, for an improved pattern for garments. In the complainant's article of manufacture each one of the series of sheets representing the different parts of a garment is distinguished or identified by a perforated mark or symbol "consisting of a letter, number, arbitrary sign, or other character, or of a combination of words, letters, numerals, arbitrary signs, or other characters." By this means the patentee attains "convenient rapid, and accurate classification of the respective parts of the pattern, the avoidance of errors and confusion peculiar or incident to the system of manufacturing and using patterns for garments heretofore in vogue, and the facilitating of a rapid and accurate cutting of material to be used in making garments, and the proper, rapid, and accurate joining and adjustment of the respective parts thereof in the construction of garments."

This explanation of the utility of the device is followed by a statement of its relation to the prior art: "Heretofore the custom has been to endeavor to identify the separate portions of the patterns by designating each separate piece by a technical name. Hitherto, on account of the difficulty and uncertainty of identification, much confusion has been occasioned, considerable delay experienced, and great quantities of material damaged or destroyed. The difficulty of identifying each particular part by means of its technical name is apparent."

The claims are two in number:

"1. As a new article of manufacture a pattern for garments, comprising a series of sheets representing different parts of a garment capable of being assembled together in a definite manner into a garment, each of the said sheets being provided with a different designating character, device, or symbol constituted by perforations in the body of the said sheets the said charac-

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ters, etc., constituting a definite series, whereby designations on the pattern may be readily transferred to the garment material to which the pattern is applied, so that the material itself when cut to the pattern may be assembled into a garment with certainty."

Claim 2, which is limited to the use of serial numbers, is not in issue.

The contents of the file wrapper are instructive. The application was rejected in the first instance for lack of invention and novelty. The examiner said of the original application: "The double use of a system of characters, such as alphabet letters or numerals, is ancient, and common in various arts analogous to applicant's, such as in building material, wherein separate timbers, stones, etc., are numbered in order to identify their places. The new State House in Boston was built with stones quarried 200 miles distant, cut and fitted in the quarry, and numbered by the workmen in order to find their proper places in the general plan. Solomon's Temple, in Jerusalem, was so constructed, according to the record in the books of Kings and Chronicles. From another point of view there is plainly no invention involved in discarding the names for the parts of a pattern mentioned by applicant and substituting therefor these shorter names—the letters or numerals—to identify them."

The applicant claimed to differentiate by reason of the fact that he not only numbered the different parts of his structure, but also provided a means whereby this numbering may be transferred to the parts of the ultimate structure and the pattern discarded. In reply, the examiner pointed out that simply perforating the letters, instead of printing them, was a very old device, to be seen in any stencil, as, for example, the patent to Fowler, 148,291. The applicant then asserted that it had not been shown to be old to provide a pattern sheet having two functions: First, the function of serving as a guide to cut out the pattern from the fabric; and, second, the function of providing means for applying identifying marks directly to the fabric cut out to designate the said fabric by the numerals or symbols appearing in the pattern, to the end that the parts of the garment may be readily assembled by reference to a chart of instruction accompanying the pattern. To this the examiner replied by citing the patent to Rinder, 1,696, to show that it is old to perforate the designating characters in the body of each part of the pattern series, for applicant's purpose of marking the cloth with such character at the same time with the outlines of the pattern, by dusting chalk therethrough. The applicant rejoined that the patent to Rinder does not clearly show that the numerals are perforated in the pattern, and, even if they were so perforated, they do not constitute a definite series whereby the various parts of the pattern may be identified. But the application was finally rejected by the examiner on June 17, 1899, for failure to disclose patentable invention. Briefly restating the grounds, he pointed out that the British patent to Rinder, 1,696, shows a series of patterns having a perforated designated character for the purpose of sifting powder through upon the fabric to be cut out; and the domestic pattern to Slade, 156,382, shows a series of patterns having each a designating character. In view of this state of the art, he held that all the applicant had done was to substitute for the designating character employed by the British patentee a series of designating characters whereby he could assemble in a certain predetermined order the various sections of a garment, and that this was common in the arts.

On appeal to the examiners in chief the decision of the examiner was reversed. Their decision was substantially this: The applicant's device is an improvement on the ordinary patterns of commerce, in which the separate patterns which together make the pattern of a garment have been differentiated from each other by names given to each part pattern. By distinguishing each part of a pattern by a number, letter, or symbol stenciled in it, the identification of each part relatively to the other parts can be transferred to the position of the cloth beneath the part, and also serves to indicate concisely the parts in a table of instructions for guidance in laying the patterns on the cloth and for assembling the cloth parts of the garment. Slade's patent, in which the contour of the parts is relied on, has not the means for identifying each part relatively to the other. Nor in Rinder's patent is there a mark on each part distinguishing it from every other part. What the applicant has done is to apply by the means disclosed by the Rinder patent to separate

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part-patterns different marks which distinguish each from the other. By this novelty the utilities mentioned are secured.

Now, from the additional proof of the prior art presented at the hearing, it appears that the Butterick Company itself made and sold patterns as early as 1872 in which the individual pieces referred to in the printed labels were identified by groups of perforations. One perforation identified the collar, two perforations the sleeve, and so on. Such groups of perforations were certainly symbols within the clear meaning of the claim, and were intrinsically conformed to a definite series, as well extrinsically by reference to the label. The capacity to permit chalking through upon the material, upon which the first claim of the patent in suit relies, is a well-known incident of the use of perforations, and is therefore inherent in these groups of perforations. A number of the prior patents in evidence make it clear that chalking through was well known in the pattern art, as in the patent to Thomas, 109,686, where this is shown both for transferring the outline of the pattern to the cloth and for transferring identifying numerals as well. It is true that a separate numeral is not shown on each piece drawn on the Thomas pattern; but the numerals differ on at least two pieces, and must have been meant as identifying factors for some purpose. Surely it cannot be patentable to identify ten pieces by different numbers, where two have been so identified before. To the same effect is the Slade patent, 156,382. To be sure, the principal plan set forth therein is the identification of the different parts by different colors; but the patent makes it the use of printed distinguishing marks or names in lieu of or in addition to the colors.

This clear disclosure is rendered more forcible by the fact that in the description of the parts of the pattern in the patent itself each is referred to by an identifying letter. There can be no possible difference between identifying the parts of the pattern in the patent and identifying them in the sewing room. In addition, the witness Glick testified that he was a cutter for the Domestic Pattern Company, and that he personally cut into superposed pattern sheets the numerals intended for identification of the parts. The witness Newton corroborates Glick as to the use of numerals for identification purposes on the Domestic pattern, save that he remembers them as used in 1874 or 1875, instead of 1889, as Glick testified. It is probable that the time assigned by Newton is correct, since the witness Pearsall states that the Domestic Company did not use numerals after 1884, which is the earliest date of his acquaintance with the Domestic patterns.

In view of this proof of the prior art, it is apparent that the patent was issued upon a misconception of the prior art. Pattern parts had not been identified theretofore, as the examiners in chief were led to believe, merely by technical names. Moreover, with respect to the use of symbols in "a definite series," upon which much stress is laid, it is to be observed that it is based upon the fact that the symbols used were referred to serially or in definite succession in a label or description which accompanies the pattern. But such label or description is not called for by the claim, or even mentioned in it. If it were, the "article of manufacture" to which the claim is addressed could not include a physically separate device such as the printed description. Even if the complainant's contention were tenable, it is clear that any symbols whatever may be said to form a definite series since in this art a label has been customarily employed in connection with the paper pattern.

I am of opinion that it did not involve invention in 1898 to produce the article of manufacture claimed by the patentee in the claim in suit. In view of the explicit language of the specification and claim the claim cannot be limited to any particular kind of symbol. But, if it be assumed that the issue is whether it involved invention to supply identifying numerals or letters specifically formed by perforations made in the various parts of a garment pattern, assigning a different numeral or letter to each part, the same conclusion follows. The use of two specified perforated numerals, as shown in the Thomas patent and model, left no room for invention in using a greater number of such numerals where more parts were to be identified. Particularly is this true in view of Slade, who used twenty-four letters for twenty-four separate pieces. Since it was old to use a separate symbol of some kind, such as groups of perforations, on each piece of a tissue paper pattern, as used in

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Butterick patterns as early as 1872 it was a mere carrying forward of the original thought to adopt the perforated numerals shown as identifying agents for two pieces in the Thomas patent, or the same class of symbol shown in the British patent to Rinder. Since perforated numerals were old, as shown by Thomas, for identifying two different parts of a pattern, it was a mere change in degree to use such numerals for as many as seven or eight different parts, as had been done with the cluster symbols of Butterick. Since in the Slade patent each of the twenty-four cluster pattern parts shown has a separate printed letter for purposes of reference in the patent, and the patent says that any marks may be used, instead of colors to identify the pattern parts, there is no invention in perforating, instead of printing such characters, as has been done for analogous purposes in Butterick's older practice.

Where a patentee is seeking to enforce a monopoly of a seemingly obvious expedient, it is incumbent upon him to show by some kind of evidence that the seemingly obvious change was not so clearly within the domain of the expected skill of the calling as it seems to be. It is true that in some cases apparently obvious changes have been held to be patentable. But in every such case reliance has been placed upon a clear showing, either that there was a new and unexpected result, or that an old problem long unsolved had at length been mastered. There is no evidence in this record tending to show either of these conditions. The nature of the result following from the use of numerals or letters was simple identification, and that is what resulted from the use of the old Butterick clusters, not to mention the numerals of Thomas. So far as commercial use is concerned, it is significant that the New Idea Company, which is controlled by the Butterick Company, has never used the patent, and is able to sell 8,000,000 patterns a year with the cluster of perforations for identification. Furthermore, the evidence shows that the Home Pattern Company, the Pictorial Review Company, and the May Manton Company, all large distributors of patterns, have been able to sell millions of patterns each year without the employment of the so-called indispensable idea set forth in the patent in suit.

The defendant may have a decree.

Kerr, Page, Cooper & Hayward, of New York City (Thomas B. Kerr and John C. Kerr, both of New York City, of counsel), for appellant.

Hardy, Stancliffe & Whitaker, of New York City (Noah A. Stancliffe and Charles J. Hardy, both of New York City, of counsel), for appellee.

Before COXE, WARD, and ROGERS, Circuit Judges.

COXE, Circuit Judge. The patentee states that his object is to provide for the convenient, rapid and accurate identification of the respective parts of a garment pattern and the avoidance of errors and confusion. He shows in his drawings one form of his alleged invention but he says it is understood that other forms and characters may be used. He asserts that prior to his patent the custom had been to endeavor to identify the separate portions of the pattern by a technical name and that confusion arose from this habit. He seeks to remedy this by numbering each piece of the pattern by perforations in the form of figures. He says, "I prefer to use serial numbers for the purpose of illustrating the alleged invention." In the illustration attached to the specification there are twenty-three pieces in the garment pattern which are numbered from 1 to 23 inclusive.

The patent has now expired and no relief other than an accounting can be had. There was nothing new in numbering these parts separately with different designating characters made by perforations, in the body of the sheets, the characters constituting a definite series

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whereby designations of the pattern may be readily transferred to the garment materials to which the pattern is applied, so that the material when cut to the pattern may be assembled into a garment with accuracy. It is undoubtedly desirable in making a garment from a pattern containing a plurality of pieces that each of them shall be numbered so that the numbers of the pattern may be transferred to the cloth by rubbing chalk on the pattern in order that the number on the paper pattern may be accurately stenciled on the cloth. If this were done on the cloth resembling the pattern Fig. 23, for instance, the number 23 would be transferred to the cloth and would prevent any confusion occasioned by the mixing up of the various pieces. The same result would be accomplished if the operator marked "23" on the cloth with a piece of chalk.

The first claim is as follows:

"1. As a new article of manufacture, a pattern for garments comprising a series of sheets representing different parts of a garment capable of being assembled together in a definite manner into a garment, each of the said sheets being provided with a different designating character, device or symbol constituted by perforations in the body of the said sheets the said characters, etc., constituting a definite series, whereby designations of the pattern may be readily transferred to the garment material to which the pattern is applied, so that the material itself, when cut to the pattern may be assembled into a garment with certainty."

It will be seen that the claim seeks to secure as a new article of manufacture a pattern for garments comprising a series of sheets which can be assembled in a garment each of the sheets being numbered, lettered or identified in some similar manner. These identifying figures must be transferred to the corresponding pieces of cloth which are to make the completed garment. This is done by making the identifying marks by small perforations which insure accuracy in transferring the proper number to the cloth. There was nothing new in using perforated numbers, letters or other symbols for the identification of separate parts of garments.

Judge Veeder has carefully considered the prior art and we do not deem it necessary to review at length the testimony in this regard. He says:

"A number of prior patents in evidence make it clear that chalking through was well known in the pattern art, as in the patent to Thomas, 109,686, where this is shown both for transferring the outline of the pattern to the cloth and for transferring identical numerals as well."

When we consider the claim in issue we are unable to find invention in the elements of the combination singly or combined. Garment patterns made of paper were old. Paper patterns were identified by marks, figures and letters. These figures and letters were made by perforations and chalk marks on the paper transferred the figures to the corresponding pieces of cloth. No other patent shows the perforaations on twenty-four separate pieces but invention cannot be predicated of the number of pieces which make up the pattern. We agree with Judge Veeder when he says regarding the Thomas patent which fails to show identifying numerals on each piece of the pattern:

"Surely it cannot be patentable to identify ten pieces by different numbers where two have been so identified before."

The decree is affirmed with costs.

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(244 Fed. 641)

BOWERS v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. September 4, 1917. Rehearing Denied October 8, 1917.)

No. 2571.

1. POST OFFICE ⟹49—ACTIONS—EVIDENCE—JURY QUESTION.
In a prosecution for violating Pen. Code, § 215 (Act March 4, 1909, c. 321, 35 Stat. 1130 [Comp. St. 1916, § 10385]), by using the mails in connection with a scheme to defraud, where it was contended that defendant, making misrepresentations as to his ownership of Mexican lands and their character, disposed of such lands when he did not have title, evidence *held* to sustain a conviction.

2. POST OFFICE ⟹49—OFFENSES—ESSENTIALS.
The government, in order to convict, must establish that defendant entered into the scheme charged, that he intended to defraud, and that for the purpose of executing his scheme he used the mails.

3. CRIMINAL LAW ⟹155—USING MAILS TO DEFRAUD—LIMITATION.
The essence of the offense denounced by Pen. Code, § 215, being the use of the mails in pursuance of such scheme, a prosecution thereunder is not barred by limitations because the scheme was devised more than three years prior to the filing of the indictment, where overt acts were committed within that time.

4. POST OFFICE ⟹48(4)—OFFENSES—INDICTMENT.
A count in an indictment indorsed as an indictment for violation of Pen. Code, § 215, which elaborately charged a fraudulent scheme, and that defendant in pursuance thereof fraudulently and feloniously placed and caused to be placed in the mails a letter, duly set forth, is sufficiently definite to show that it charged an offense under such section.

5. POST OFFICE ⟹49—OFFENSES—EVIDENCE.
Testimony as to events relating to the scheme, but occurring more than three years before the filing of the indictment, is admissible where within that period the mails had been used in furtherance of the scheme.

6. CRIMINAL LAW ⟹491(2)—EVIDENCE—HANDWRITING—ADMISSIBILITY.
Under Act Cong. Feb. 26, 1913, c. 79, 37 Stat. 683 (Comp. St. 1916, § 1471), declaring that, where the genuineness of the handwriting of a person is involved, any admitted or approved handwriting of such person shall be competent evidence as a basis for comparison by competent witnesses, or by the jury, court, or officer conducting such proceeding, to prove or disprove such genuineness, it was proper, in a prosecution for using the mails in connection with a scheme to defraud, to prove the signature of defendant, to admit documents as to which the witnesses testified they had seen defendant append his signature.

7. POST OFFICE ⟹49—OFFENSES—ADMISSIBILITY.
Where defendant, having devised a scheme to defraud, intentionally, and for the purpose of carrying it out, wrote a letter and mailed it in violation of Pen. Code, § 215, within three years prior to the filing of the indictment, it was not necessary, in order for such letter to be admissible, that it should show on its face that it was in furtherance of the scheme to defraud.

8. CRIMINAL LAW ⟹931—TRIAL—MISCONDUCT OF JUROR.
Where defendant contended that a juror, during the course of the trial and after adjournment, asked whether defendant would take the stand, and based upon such occurrence a claim of bias and unfairness on the part of the jury, defendant is not, having failed to call the matter to the attention of the court before verdict, in a position to thereafter call the matter to the court's attention.

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9. CRIMINAL LAW ⟹1160—APPEAL—REVIEW.
Where there were conflicting affidavits relating to defendant's claim of unfairness on the part of the jury, the matter cannot be reviewed on error, having been decided adversely as to defendant by the trial court.

10. POST OFFICE ⟹50—OFFENSES—INSTRUCTIONS—"OWNED."
In a prosecution for using the mails in connection with a scheme to defraud in the disposition of Mexican lands, which it was claimed defendant did not own though he claimed to have a contract for the purchase of such lands, etc., a charge that the word "owned" implied that defendant had such an interest in and dominion over the property that he could convey a good and sufficient title thereto to an intending purchaser, when taken in connection with instructions that if the representations alleged to have been made in the indictment were false but defendant believed them to be true, they were not fraudulent, is sufficient.

In Error to the District Court of the United States for the Southern Division of the Southern District of California.

Clarence P. Bowers was convicted of violating Pen. Code 1910, § 215, by using the mails in connection with a scheme to defraud, and he brings error. Affirmed.

In an indictment containing three counts, Clarence P. Bowers and others were charged with a violation of section 215 of the Penal Code of 1910. Bowers was convicted under the second count, and asks review under writ of error. The indictment was filed January 10, 1913.

Stated in a brief way, the scheme charged to have been formed before February, 1910, was that the persons intended to be defrauded should be communicated with by mail by Bowers and the others through the medium of a pretended corporation, the C. P. Bowers & Co., and certain letters, papers, and advertising matter containing false and fraudulent representations, and statements concerning the corporation and its business, were to be sent to them by use of the mails. Bowers pretended to be the president, and other defendants were to be represented as the other officers of the corporation, but it is alleged that, in fact, the pretended corporation was not organized under the law of any state or of the United States, but C. P. Bowers & Co. was the name of a fraudulent corporation, and the guise under which Bowers and his associate defendants carried on the scheme. Bowers and the others were to advertise to persons to be defrauded that C. P. Bowers & Co. owned 630 acres of land near Tampico, Mexico, and had "a perfect warranty deed" to said land, and that the title thereto was "free from any possible defects"; that part of the land was cleared and planted; that machinery had been bought to cultivate part of the land to bananas; that banana trees had been planted; that bananas would be planted also for the use of the corporation, and that 300 acres were to be sold to persons intended to be defrauded, for $200 per acre in cash or in installments; that immediately upon payment of the full purchase price of each acre, the C. P. Bowers & Co. would give the purchaser immediate possession and title, and would cultivate the land and plant banana trees, and that the purchaser would have certain quantities of bananas for each acre of ground; that the corporation would sell the bananas and, after deducting specific sums for services in marketing and for reimbursement, the balance of the sale price would be sent to the purchaser of the land; that the purchasers could pay a first installment of 12½ per cent. of the purchase price at the rate of $200 per acre, and take 30 days within which to investigate the land, and if at the end of 30 days the purchaser did not wish to take the land the C. P. Bowers & Co. would return the purchase money. It is alleged that all these representations and publications were fraudulent, and part of the scheme to defraud, and were to induce persons, in reliance upon the advertisements and publications, to buy portions of the land pretended to be owned by C. P. Bowers & Co., and to pay Bowers and his associates and to the pretended corporation large sums of money,

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which sums Bowers and other defendants would wrongfully convert to their own use. It is alleged that when the scheme was devised Bowers knew that it was all fraudulent. and that C. P. Bowers & Co. did not own the land described, and did not have a perfect or warranty deed to the 630 acres of land, and did not have any title to the land which was free from any possible defects, or any title; that Bowers and the other defendants never had title by perfect warranty deed or otherwise to 630 acres of land described, in Mexico or anywhere else in Mexico, in excess of 50 acres; that none of the land was cleared or planted; that no machinery for cultivation had been bought; that there had not been the number of banana shoots planted that were said to have been; that the defendants did not intend to clear and cultivate any land, or to give the purchaser the possession or title contemplated by the advertisements, and did not intend to pay any money over to the purchaser of the land, or to refund any installments to purchasers not desiring to take the land; that the land was not worth $200 per acre, or any other sum in excess of $10 per acre. It is charged that, in order to carry out the scheme as devised, they fraudulently mailed a letter dated February 19, 1910, to T. E. Hughston, at Pomona, Cal., in which Bowers wrote to him that he found it impossible to tell him exactly when he would have a deed for the seven acres of land which Hughston had bought.

Newton J. Skinner, Carl N. Skinner, Earl Rogers, and C. E. Williams, all of Los Angeles, Cal., for plaintiff in error.

Albert Schoonover, U. S. Atty., and J. Robert O'Connor and Clyde R. Moody, Asst. U. S. Attys., all of Los Angeles, Cal.

Before GILBERT and HUNT, Circuit Judges, and WOLVERTON, District Judge.

HUNT, Circuit Judge (after stating the facts as above). [1, 2] Counsel for defendant has earnestly contended that the evidence was insufficient to sustain a verdict. One of the witnesses for the government testified to this effect: That he was a farmer and mechanic, and about 1909 he bought seven acres of this banana land from C. P. Bowers & Co.; that his transaction was with C. P. Bowers, to whom he paid $1,000 on the purchase; that there was $400 still due, and he sent an agent to Bowers to endeavor to buy only five acres, but failed to adjust the matter as desired, and thereafter paid the $400 still due to Bowers; that he dealt principally with Gillespie, an agent of Bowers; that he received certain circulars through the mail before he made the purchase and a contract, and that he discussed the contract with Bowers, to whom he paid the money in June or July, 1909. The contract is a receipt of a deposit to secure the described quantity of land in the "C. P. Bowers & Co. Banana Plantation," etc., subject to certain conditions. It is recited that, payment having been made, the property will be granted "by good and sufficient deed of conveyance, the above-named lessee grantor furnishing unlimited certificate of title showing title to said property free and clear of incumbrance, within 10 days from date." The contract is signed "C. P. Bowers, Pres." To the contract was attached a "rider," wherein C. P. Bowers & Co. agree to plant the acreage described, within a month from date of the contract, to banana shoots, not less than 200 to the acre, and irrigate, maintain, and market the first year's crop without additional expense other than payment in full of the purchase price, and to continue marketing

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the crop at special rates. We quote from the testimony of the witness:

"Well, I paid him $400, and he acknowledged receipt of it, and then I says, 'This circular says that as soon as I make the last payment on it you will hand me the deed. I would like to have the deed.' 'Well,' he says, 'I can't do it just now.' 'Well,' I says, 'Why?' 'Well,' he says, 'it takes some time to get a deed made in Mexico.' 'Well,' I says, 'why did you print it in your circulars?' and he says, 'Oh, you ought to understand anything in a circular ain't law and you don't have to go by it. We have to go by things that we can.' 'Well,' I says, 'how long before you can get it?' 'Well,' he says, 'I don't know, it might take two or three months.' I says, 'I am going away; I have done made my arrangements to go back to Georgia, and I would like to know about the matter.'"

This witness further said that Bowers told him that Gillespie was his agent. On July 16, 1909, Bowers wrote to Hughston that he was entitled to 7 acres in the banana plantation, and said:

"Your deed for the same will be ordered up with the next allotment of these documents, and presented to you for your signature just as soon as practical."

On December 17, 1909, Bowers wrote Hughston that he hoped to have the deed for the 7 acres soon, but he doubted whether he could give to Hughston a "river frontage as originally planned," unless he took up 10 acres, and would like to know if Hughston desired the additional 3 acres. On December 27, 1909, he wrote to Hughston that the deed for the 7 acres would be issued and forwarded for his signature "just as soon as practical," and added that it sometimes took as long as 9 or 10 months to have the documents issued, recorded, etc., in that country. On February 19, 1910, Bowers wrote him that it was impossible for him to tell him exactly when he would have the deed for the 7 acres, that he was hurrying things, "and rest assured that I will have it in your hands at the earliest possible moment." Mr. Hughston testified that he never received any deed, but about April, 1914, a month before the trial of the defendant was begun, he received a letter and deed for 7 acres and turned the papers over to the district attorney. Witness said the deed did not cover the land he bought, nor did it obligate Bowers to cultivate as required by the original contract made. On cross-examination he testified that there was a mistake about his having made a contract to buy 10 acres; that Gillespie put him down for 10 acres, but that he didn't want that much, and after a little squabble he adjusted the matter with Bowers by agreeing to take 7; that he called on Bowers about the delivery in the matter of the deed, and Bowers told him that he was having trouble about getting the deed from Mexico; that he never accepted the deed sent to him in April preceding the trial; that Gillespie told him C. P. Bowers & Co. was a joint-stock company. One of the circulars which the witness said he read set forth in elaborate terms that C. P. Bowers & Co. owned 630 acres in "Tropical Mexico," and would sell 10 acres on an easy installment plan, cultivate it, market the product, and remit the profit, less only a fair discount for acting as sales agents. The land was described as rich and as suitable for banana crops, which would mature rapidly, and bring in at least $41.62 the first year and

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$117 the second year. With great detail the quantity of bananas and the prices to be realized were stated in the circular and the contemplated purchaser was advised as follows:

"In the second year you see, you have 1,000 trees, and the proportionate return will be the same, excepting that it will be less the following charge, which is for the services of C. P. Bowers & Co. and is itemized as follows:
"For marketing the fruit, 4¢ per bunch.
"For cultivating your ground, 10% of cash received."

The circular announced that C. P. Bowers & Co. were simply the agents of the purchaser and the contract could be terminated at any time upon the purchaser's desire. The information with respect to titles was as follows:

"Titles.

"The title to the land owned by C. P. Bowers & Co. is a perfect warranty deed, and is free, therefore, from any possible defect.

"Terms.

"We sell the land at $200 per acre. Ten acres sold for $200. You can pay the money down and secure immediate possession of title, or pay for each acre of land you take on the installment plan, i. e., $25 down and $15 monthly till paid. Deed to your land is handed you the moment the last payment has been made. When you receive your deed you have a complete acre or more (if you have bought more) of land under full cultivation, we, as your agents, having brought it to that stage. Thereafter you receive your annual income as its products are sold by us."

A clause in the circular stated that Alex. Smith & Co. of Tampico would tell who C. P. Bowers & Co. were, and that they were thoroughly responsible people, and knew about the title, situation, etc. Appended to the circular were many quotations from newspapers and writers concerning the banana growing industry, and paragraphs concerning the advantages of market facilities, and how the investment would bring an income for life. At the close of the circular were some seven "Hints and Paragraphs," such as, "Know your money is invested in an enterprise producing something for which a demand already exists;" "The savings of the average man never bring wealth; profitable investments alone create riches," etc.

There was further testimony from witnesses who stated that after reading the advertisements to the effect that the opportunity offered a chance to make an income for life, and that a half acre for every $100 invested would yield 26 per cent. the first year and 58 per cent. the second and succeeding years on the money invested, they bought some of the land from Bowers. One witness, J. C. Baird, testified that Bowers pointed out to him on a map the location of banana plantations and said that they were selling the land and intended to put a pumping plant on it for irrigation; that he corresponded with C. P. Bowers & Co. and together with his daughter concluded to make an investment; that he received a contract through the mails after remitting $190 in March, 1909. Mr. Baird introduced a letter which he had received from "C. P. Bowers, Pres." on paper headed, "C. P. Bowers & Co., Plantation Owners; C. P. Bowers, President; C. P. Bowers, Vice-President; H. C. Myers, Secretary—Los Angeles, Cal." This letter inclosed contracts made out in the names of J. C. Baird and

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Eva Moore, calling for one acre of banana land each. With the testimony of this witness there was introduced a letter addressed to J. C. Baird, signed C. P. Bowers, Pres., written on paper with a caption of the corporation, wherein Bowers wrote him that in answer to his letter of the 15th of May, 1909, they were going to require—

"a little more time than we anticipated in issuing the deeds to yourself and daughter. * * * Things move very slow much slower in Mexico than in the United States, in fact, and especially when you are awaiting upon native officials."

Again, on June 30th, C. P. Bowers, Pres., wrote to Mr. Baird that they were doing everything possible to get the deeds, but that it required 9 months to have a deed delivered and recorded in one instance. The letter advised Mr. Baird that the time of the delivery of the deed did not interfere with the care of his land, and added that:

"The really important part of the entire transaction as we see it, lies in developing the land and producing the crop."

Again, on August 7, 1909, in a letter signed C. P. Bowers, Mr. Baird was advised that he (Bowers) had not yet received the deeds but hoped to have them ready soon, and that both acres of land for which shoots had been planted before Mr. Baird and his daughter purchased would have to be replanted before returns would come, because of a wash and storms, etc. At a later time, on February 2, 1910, Bowers wrote to Mr. Baird that he hoped before long the deeds would be ready for delivery, and again on February 9, 1910, he wrote to Mr. Baird that there was an oil lease on the whole tract of 630 acres which a large company held, and that the rear of the 630 acres adjoined some land in which there were some strikes of large "gushers." Mr. Baird said that he told Bowers at one time that nearly a year had gone by since he had purchased the property and that the promises for the deed had not been fulfilled; that he had paid cash and wanted his title; that he told Bowers that he had concluded that he could not make a deed to the property because he did not have any title to it; that Bowers remarked that he had some land down there, and when he got the matter fixed up "he thought he could make me a title in the next 60 days."

"Said I, 'Then you virtually admit that you did not own that land at the time you sold it to me?' 'Well,' he says, 'we paid some money on the land and hope to get at least 50 acres;' and I says, 'Mr. Bowers, I am satisfied that you don't own that land, and never did own it and can't give me a title to the property I bought of you. Now, I demand my money back. I demand you to refund to me the money that I paid for this property that you had not title to and couldn't give me a title to.' He says, 'I haven't got any money.'"

Thereafter this witness consulted counsel and made a demand, and received a document about the middle of April, 1914. The document, dated April 14, 1914, is entitled a contract of bargain and sale entered into between C. P. Bowers and J. C. Baird under certain designated conditions. In the first of the conditions Bowers states that he is the sole owner of a certain portion of the property described, which he acquired from Alex. Smith by bargain and sale on July 7, 1910. In the third paragraph the land conveyed from Smith to Bowers is described as 24 hectareas, 2,915 square meters from the southern portion

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of said parcel of land, and C. P. Bowers sells, grants, and conveys to J. C. Baird lots 14 and 20 out of block 1, containing one acre more or less, and reserving 3 feet on the east and west boundary, etc. In the ninth paragraph of the contract Bowers declares that the property is free and clear from all incumbrances with the exception of a lease to exploit underground product, the lease having been given in 1901. This deed or contract was mailed to Mr. Baird, together with a letter from Mr. Newton J. Skinner, advising Mr. Baird that he is inclosing a deed for land purchased from Mr. Bowers out of the Bowers Mexican plantation according to the previous contract, and that "it was only within the last few days that Mr. Bowers had succeeded in obtaining a deed to the property and getting it recorded, although the deed was issued to Mr. Bowers about the time of the contract." Witness said that he never had received any profits from the land and that the deed sent him did not call for the land at all; that it was an entirely different piece from that which he had bought, and for that reason he had not accepted the deed and considered it of no value. Alex. Smith testified that he had resided in Tampico, Mexico, since 1900; that he met Bowers in 1907, and that he, Smith, had a deed for the 630 acres concerning which other witnesses had testified; that the final deeds for the property were made to him January 23, 1908, and January 25 and April 7, 1908; that he never had seen anything growing on the land except a little corn; that there were no fruits except wild ones there; that about a year before the trial he had been upon it, and that not more than 40 or 50 acres of the entire tract had been cleared, the clearing being along the river front; that it was grown up in jungle and weeds; that he knew nothing of a pumping plant upon it; that about 1907 he had had a transaction with C. P. Bowers concerning some of the property; that he gave Bowers a letter of option to buy the property at $10 an acre, payments to extend over a period of about a year. The witness explained he had lived in Mexico; that Bowers paid him about $1,500, and in the following year, 1908, he made a new agreement; that before the new agreement was made Bowers asked him to make deeds to various customers to cover some 40 or 50 acres and to convey lands near the river front in the property; that he made some of the conveyances but declined to make others; that he made a new option with Bowers' father; that the second contract called for various payments and contained an obligation whereby Smith should give Bowers a perfect warranty deed when the final payments were made; but that no payments were made on the contract, which expired by limitation, and that witness and Bowers corresponded. Smith said that about July, 1910, he gave Bowers a deed for about 60 acres in the extreme southern end of the property, and a deed for a small portion in the northerly end of the property; that when the contract of option expired he had deeded to Bowers' customers portions of the northerly tract and concluded to deed to Bowers the 60 acres in full settlement; that the deed for the 60 acres settled all relations between them. Witness said that when Bowers wanted deeds for part of the front lands, he refused until the land was paid for and that it generally took two months to get a deed recorded in Mexico.

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There was much more evidence tending to support the case of the United States, but with that to which we have referred, and the admission that Bowers did not have a deed to the property which he sold to purchasers, enough has been shown to demonstrate that the case was clearly for submission to the jury under appropriate instructions to the effect that, in order to convict criminally, it was necessary for the government to establish that the defendant entered into the scheme charged, that he intended to defraud those whom he corresponded with, and that for the purpose of executing the scheme he intended to use the mails of the United States.

[3, 4] Error is assigned because the court overruled a special plea and motion to quash the indictment. The point presented is that the count under which Bowers was convicted does not specify that the offense charged was committed within three years prior to the filing of the indictment, January 10, 1913, and that the count is indefinite as to time and the mailing of the letter, and as to the description of the offense. But the scheme charged to have been fraudulent is elaborately set forth, and the defendant is directly charged with having fraudulently and feloniously placed and caused to be placed in the post office at Los Angeles, a letter in an envelope addressed as hereinbefore described. The letter is itself set forth in the second count, and is of date February 19, 1910. In Mitchell v. United States, 196 Fed. 877, 116 C. C. A. 436, it was held by the court that under an indictment for violation of section 5480 of the Revised Statutes as amended by the amendment of March 2, 1889, c. 393, 25 Stat. 873 (U. S. Comp. St. 1901, p. 3696), it was immaterial when the scheme to defraud was devised, but that if the scheme or artifice was devised more than three years prior to the return of the indictment, but was in existence and the defendant was operating under it within three years, the case would be without the statute of limitations and might be prosecuted. We are of opinion, too, that there was sufficient particularity of statement in the indictment to demonstrate that it was for the violation of section 215. Moreover, it was indorsed as an indictment for violation of that section, and the offense described in the instructions of the court was that defined in section 215.

[5] Appellant objected to the testimony of a number of witnesses introduced by the government, on the ground that the events to which they testified transpired more than three years before the filing of the indictment. But under the rule of Mitchell v. United States, supra, the court correctly overruled such objections.

[6] The government, to prove the signature of the defendant, Clarence P. Bowers, offered a witness who said he had seen Bowers write his name to the particular documents offered. The court then admitted such documents with the signature of Bowers as exemplars, and letters bearing signatures C. P. Bowers were thereupon admitted in evidence. To all such evidence the defendant objected, but the objections were overruled and the jury were allowed to make comparison of the letters and documents. This ruling was proper under Act Cong. Feb. 26, 1913, c. 79, which provides that, where the genuineness of the handwriting of a person may be involved, any admitted or proved hand-

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writing of such person shall be competent evidence as a basis for comparison by witnesses, or by the jury, court, or officer conducting such proceeding, to prove or disprove such genuineness. Short v. United States, 221 Fed. 248, 137 C. C. A. 104.

[7] It is urged that the court erred in admitting the letter set forth as an overt act charged to have been mailed by the defendant, Bowers, to Hughston. The objection is based upon the ground that the letter does not appear to have been to further the scheme charged to have been devised by the defendant. But if the scheme had theretofore been devised and was fraudulent, and the defendant intentionally and for the purpose of carrying out the scheme wrote the letter described and mailed it within three years prior to the filing of the indictment, it was not necessary that the letter should on its face show that it was in furtherance of the scheme to defraud.

[8, 9] It is argued that defendant was not granted a fair trial because of the misconduct of a juror. Bowers, the defendant, in an affidavit filed in the District Court, set forth that upon one day in the course of the trial at the adjournment of court, and before he and his counsel had left their places in the courtroom, a juror stepped over to the attorney's table, and, leaning over the table, said to him (Bowers): "Are you going to take the witness stand in your own behalf?" Bowers in his affidavit said that he answered that he did not know, and adds that the manner of the juror was such that it made him (Bowers) feel that the juror was speaking for other jurors than himself, and fearing lest if he did not take the stand it would prejudice him in the mind of the juror, he took the stand; that he believed that because of the fact that he did not take the stand, and thus gave the prosecution an opportunity to comment upon the failure of the defense to produce certain evidence, the jury became prejudiced. Several other affidavits in support of Bowers' motion were filed. The juror named by the defendant, Bowers, filed a counter affidavit wherein he positively denies that he ever spoke to Bowers or to his attorney or communicated with either of them in any way whatsoever during the trial, and states that he thoroughly understood his duty as a juror which forbade him to ask any such question as Bowers said he asked him. The matter does not appear to have been brought to the attention of the court before the trial closed, although the defendant had ample opportunity to advise the court of the incident. Defendant is therefore in no position now to claim that his rights were prejudiced. Furthermore, the District Court having considered the matter the appellate court will not disturb the order denying a new trial.

[10] Many errors assigned relate to instructions given and refused. Special stress is put upon the charge of the court with respect to the word "owned," but we think that the meaning given was sufficient. The court said:

"That the word 'owned,' on the fourth page of the indictment together with the clause in which it appears, namely, 'The said C. P. Bowers & Co. owned six hundred and thirty (630) acres of land on the Tamesi river,' etc., implies that the defendant had such an interest in, and dominion over, the property referred to, that they could convey a good and sufficient title thereto, to an intending purchaser."

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The court also instructed that if the representations intended to be made as alleged in the indictment were false, but defendants believed them to be true, then said representations would not be fraudulent; but if, however, such representations were false, and defendants knowing their falsity, or not believing them to be true, intended they should be made to deceive and induce the persons to whom they were to be made to send or pay money to the defendants or to C. P. Bowers & Co., then the scheme was one to defraud. This, in connection with the other portions of the charge wherein the court defined the elements of the offense, was correct. And, generally, the whole charge sufficiently set forth the legal principles which controlled.

After painstaking examination of the voluminous record, we fail to find any substantial ground upon which to predicate a reversal of the case, and, as the record discloses that defendant had a fair trial, the judgment must be affirmed.

Affirmed.

(244 Fed. 650)

BRYAN v. LOUISVILLE & N. R. CO.

(Circuit Court of Appeals, Eighth Circuit. April 12, 1917. Rehearing Denied October 22, 1917.)

No. 4801.

1. RAILROADS ⟹54—RIGHT TO CHANGE LOCATION OF ROAD.
   Where a railroad has been constructed and operated for 40 years, it could not be changed to a location several miles from the original location, for a distance of 20 miles, without legislative authority.
2. COURTS ⟹366(7)—DECISIONS OF STATE COURTS—FORCE IN FEDERAL COURTS.
   Const. Ala. 1901, § 246, provides that no railroad in existence at the time of the ratification of such Constitution shall have the benefit of any future legislation, other than in execution of a trust, except on the condition of complete acceptance of all the provisions of that article. *Held*, that the holding of the Supreme Court of Alabama that no written acceptance of the Constitution is necessary is binding on a federal court.
3. RAILROADS ⟹54—RIGHT TO CHANGE LOCATION OF ROAD.
   Where a Kentucky railroad corporation complied with Const. Ala., § 232, imposing conditions on foreign corporations doing business in the state, and for many years transacted business in Alabama, and availed itself of the benefits of the general statutes of that state, it accepted the provisions of the Constitution of 1901 as required by section 246, so as to entitle it to the right given to railroad corporations to relocate their line of railroad by Act Ala. Feb. 18, 1903 (Laws 1903, p. 131), as amended by Act. Aug. 20, 1909 (Laws 1909, p. 62).
4. RAILROADS ⟹33(1)—FOREIGN CORPORATIONS—DOMESTICATION.
   Acts Tenn. Dec. 4, 1851 (Laws 1851–52, c. 23), giving a Kentucky railroad corporation authority to construct a railroad between certain points in Tennessee, and to exert some of its corporate powers, and recognizing the railroad as a Kentucky corporation, did not make it a corporation of both Kentucky and Tennessee.
5. RAILROADS ⟹54—RIGHT TO CHANGE LOCATION OF ROAD.
   Where the charter of a Kentucky railroad corporation, though not in express terms, authorizing it to relocate its line of road, contained no prohibition against such relocation, the company could relocate its line of road in Alabama, providing the laws of Alabama permitted it to do so.

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as the change in location is peculiarly a subject of local control, especially as the Kentucky statutes authorize railroad companies to relocate their roads.

6. RAILROADS ⟹54—RIGHT TO CHANGE LOCATION OF ROAD.
Where the original termini of a railroad were Decatur and Montgomery, a change in such road for about 20 miles, to a new location several miles distant, was not in violation of Act Ala. Feb. 18, 1903, as amended by Aug. 20, 1909, authorizing railroad companies to relocate their line, but providing that they shall not change the termini or make an entire departure from the original line between such termini, as the statute refers to the original termini of the road, and not to points on the line between which there is a relocation of the track.

7. RAILROADS ⟹54—RIGHT TO CHANGE LOCATION OF ROAD.
Though some of the land upon which a railroad was constructed was granted by the United States to the state for the benefit of such road, the permission of Congress was not necessary in order to lawfully relocate the line of road, this being a matter for state legislation.

8. RAILROADS ⟹72(3)—CONTRACTS AS TO LOCATION OF ROAD—PERFORMANCE OR BREACH.
Where deeds to a railroad right of way recited that the building, erecting, and running of the railroad on and along the land was a part of the consideration, the building of the road on such land and its maintenance for 40 years was a compliance with the contract, and its removal to a new location after more than 40 years was not a breach of the contract.

9. RAILROADS ⟹72(3)—CONTRACTS AS TO LOCATION OF ROAD—CONSTRUCTION.
Where a railroad company conveyed to plaintiff land in the immediate vicinity of its road, which he devoted to the cultivation and growth of commercial peach and apple orchards, a recital in the deed that valuable improvements to be put on the land conveyed were a part of the consideration, did not amount to a contract on the part of the railroad to forever maintain and operate its line of road in its then condition, though the change in location of the road greatly damaged plaintiff's fruit business.

10. RAILROADS ⟹54—CHANGE OF LOCATION—INJURY TO MEMBERS OF PUBLIC.
A change in the location of a railroad, under legislative authority, gives a member of the public no common-law right to damages, any injury sustained by him being damnum absque injuria.

11. EMINENT DOMAIN ⟹2(1)—ACTS CONSTITUTING EXERCISE OF POWER OF EMINENT DOMAIN.
A railroad company, by changing the location of its road did not take, injure, or destroy property in the vicinity of the old location, within Const. Ala. 1901, § 235, providing that municipal and other corporations, invested with the privilege of taking property for public use, shall make just compensation for the property taken, injured, or destroyed by the construction or enlargement of their works, highways, or improvements.

12. PLEADING ⟹339—PLEA IN ABATEMENT—WITHDRAWAL—DISCRETION.
It was within the trial court's discretion to allow defendant to withdraw its plea in abatement and file an answer, especially where, on plaintiff's own theory, a plea in abatement was an unauthorized pleading.

13. APPEAL AND ERROR ⟹1070(1)—TRIAL ⟹323—HARMLESS ERROR—VERDICT.
A verdict signed by one juror, by direction of the court, was sufficient, and plaintiff was not prejudiced because the jurors were not all required to sign or permitted to select their own foreman to sign it for them.

In Error to the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Action by Edward Jefferson Bryan against the Louisville & Nashville Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

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S. Mayner Wallace and Shepard Barclay, both of St. Louis, Mo., for plaintiff in error.

Edward S. Jouett, of Louisville, Ky., and Harold R. Small, of St. Louis, Mo., for defendant in error.

Before CARLAND and STONE, Circuit Judges, and MUNGER, District Judge.

CARLAND, Circuit Judge. The parties to this action will be named as in the trial court. The plaintiff sued the defendant to recover damages which he alleged resulted from the abandonment by defendant of its main line of road from New Castle to Bangor, Blount county, Ala. At the trial of the case counsel for defendant moved the court to direct a verdict in its favor. The motion was granted, and the plaintiff has brought the case here assigning error. The plaintiff stated his causes of action in two counts.

The first count, after alleging the purchase of about 2,600 acres of land in Blount county, Ala, in the immediate vicinity of Reid's station, on the line of the South & North Alabama Railroad Company, hereafter called "South & North," and the cultivation and growth of commercial peach and apple orchards thereon, the purchase from said railroad company of its line of railroad by the Louisville & Nashville Railroad Company, hereafter called the "Louisville & Nashville," and the assumption by the latter of all the duties and obligations which could be required of the South & North as a common carrier, further alleged as follows:

"Plaintiff further states that at and before his purchase of said land, and during the development thereof, as stated, defendant contracted and agreed with plaintiff, in consideration of plaintiff's making and developing said investment and furnishing to defendant the tonnage therefrom, that, for as long a time as plaintiff produced said tonnage, said defendant would maintain and operate said line of railroad through and along his said land, in substantially the same way as was then being maintained and operated, and furnished to plaintiff the fast-freight and express service thereon for the products of said orchards to the markets of the United States and adequate transportation service for all the tonnage produced on said lands; but that on or about November 16, 1914, said defendant, wholly disregarding its said obligation to plaintiff, and in violation of its said contract and assurances, and notwithstanding that plaintiff had at all times offered, and was then continuing to offer, to defendant a large, and the full amount of said tonnage, discontinued and ceased operating that part of the said line of railroad through and along plaintiff's said property, at said Reid's station, and denied and still denies to plaintiff said fast-freight and express service for the products of said orchards, and all railroad facilities for all tonnage produced and to be produced on said land, and has since removed part of the roadbed of said line of railroad along plaintiff's said property and north of said Reid's station, and on account of the mountainous condition of said county and the topography thereof, and the peculiar location of plaintiff's said land, and because of the fact that there is no other accessible line of railroad therein, or means whereby any of the tonnage produced on said land may be carried away therefrom, has closed thereby all of said markets to the products of plaintiff's said orchards, and thereby destroyed the said value thereof."

The second count of the complaint, after making the allegations of the first count a part thereof by reference, alleged that plaintiff's injury was special in kind and different and greater in degree than that, if any, suffered by the public, and that under general law, as well as

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under the laws of Alabama, plaintiff might not be so injured and damaged by defendant without just compensation being made.

We have carefully read and considered the evidence in the record, and are satisfied that there was sufficient evidence to take the case to the jury upon the question of damages, and, upon the assumption that defendant was bound to furnish the plaintiff with adequate shipping facilities as alleged in his complaint, the question whether such facilities were furnished or offered by defendant to plaintiff during the season of 1915, and prior to the abandonment of the orchards by plaintiff on December 2, 1915, was, upon the evidence before us, clearly a question for the jury. We are also satisfied that taking the evidence upon the question of whether the defendant, either expressly or impliedly, agreed with plaintiff, by correspondence and mutual business relations, to maintain and operate its line of railroad through and along his said land, in substantially the same way as the same was then being maintained and operated, and to furnish plaintiff the shipping facilities stated in the complaint, with all legitimate inferences which the jury might rightfully draw therefrom, there was not sufficient evidence to take the case to the jury upon that question. The most that can be said upon this phase of the case is that the defendant, prior to the abandonment of its line of road, was desirous that the plaintiff should make a success of his business of fruit raising, as tonnage for the road would be produced thereby. The building of the spur track to connect with the tramway of plaintiff, and the sending of an agent to supervise the shipping of fruit during the shipping season, were both consistent with this desire and purpose.

It is claimed, however, that under the facts stated in the complaint, the defendant had no legal power or authority to abandon its main line, which passed near the orchards of the plaintiff, and relocate the same as hereinafter stated, and that, such abandonment and relocation being illegal, the defendant is liable for any damage resulting therefrom to the plaintiff. This is the important question in the case. The facts bearing upon the question are as follows:

The South & North was incorporated by a special act of the General Assembly of Alabama, February 17, 1854. The railroad constructed by it extended from Decatur, Ala., through Birmingham, to Montgomery, Ala., a distance of about 182 miles. Speaking without reference to entire accuracy, the line of this railroad from New Castle, Ala., to Bangor, Ala., at the time of its abandonment, November 16, 1914, had been constructed and operated for about 40 years. From 1872 to January 21, 1914, the road was controlled and operated by the defendant, the latter from 1900 owning all the preferred and 80 per cent. of the common stock. This condition of affairs arose from the fact that the Louisville & Nashville furnished the money to build the road. On January 21, 1914, the South & North, for certain valuable considerations mentioned in the deed of conveyance, conveyed all its interests in its line of railroad to the defendant, the latter assuming "all the duties and obligations which could or can be lawfully required of the parties of the first part as a common carrier, * * * and the assumption of all other indebtedness of the party of the first part owing by contract with any person, firm, or corporation or on account of injury

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to persons or damage to property and all indebtedness of any other character whatsoever." On November 16, 1914, the defendant discontinued the operation of the old line of the South & North from New Castle to Bangor, and commenced to operate the new double-track line between the points mentioned, which had been built and constructed during the previous two years. The distance between the points mentioned over the new line is about 20 miles, being about 2 miles shorter than the distance between the same points over the old lines. The new line is distant from Reid's station on the old line 4.9 miles. The average distance of the new line from the old line between the points mentioned is about 3 miles. The intervening space between the two lines is rough and mountainous, to such an extent as to be inaccessible by ordinary conveyance.

The new line departs entirely from the old line between the points mentioned. The considerations which led to the construction of the new line were to straighten the line of road, reduce curvature, and obtain lower grades, in order to facilitate the movement of business, reduce delays, and improve safety, and greatly increase the capacity of the road for handling business. The plaintiff when on the stand was asked the following question: "You admit, do you not, that the building of that double track through there on that straighter, shorter line is a matter of material interest and advantage to the general public, both in the matter of safety and expedition of service, freight and passengers?" The witness answered, "I do."

The plaintiff, relying upon the continuance of the shipping facilities furnished by the South & North as operated by the Louisville & Nashville, had, during the period of about 11 years prior to November 16, 1914, cultivated and grown on the land purchased by him, as before stated, commercial peach and apple orchards, known as the "Mont Eyrie Orchards." A portion of the orchards were located on land through which the original right of way of the South & North had been granted, a part of the consideration for such right of way being that the South & North would build a railroad on and along said lands.

Plaintiff alleges that the abandonment of the old line of road destroyed the value of these orchards; hence this suit. In the treatment of the question as to the authority of the Louisville & Nashville to abandon the old line and relocate the same as appears in the evidence, we put to one side the question as to whether the defendant offered to furnish the plaintiff, prior to his abandonment of his orchards in December, 1915, adequate shipping facilities by way of Warrior and Monmouth, with switching service over a portion of the old line to the old station at Reid's, as this question would only be material in case the defendant was bound to furnish adequate shipping facilities to plaintiff, and, in any event, it was a question for the jury under the evidence.

[1] We think it must be conceded that a railroad which has been constructed and operated for 40 years may not be relocated in the manner in which it is shown by the evidence the old line of the South & North was relocated, without legislative authority. Brown v. Railway Company, 126 Ga. 248, 55 S. E. 24, 7 Ann. Cas. 1026; Railway Company v. Kirkland, 129 Ga. 552, 59 S. E. 220; Lusby v. Kansas City, etc., R. Co., 73 Miss. 360, 19 South. 239, 36 L. R. A. 510.

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In Brown v. Railway Co., supra, it was said:

"It is generally held that where a railroad company to which has been given the power to choose its particular route between designated termini, has exercised its discretion in this regard, its power of choice is exhausted, and it cannot subsequently change its location without express legislative authority. Thus a change cannot be made for reasons of convenience, or expediency, or economy merely."

A great number of authorities are cited to support this statement of the law. In L. R. A. 1915A, 549, it is said:

"The general rule seems to be that a railroad cannot abandon its road or a branch, even though it may be operated at a loss, and cases which are apparently in conflict with this rule will be found to have turned on special circumstances that warranted the decision."

The defendant in this case does not contend that the law is otherwise, but seeks to show that there was legislative authority to make the relocation described in this case, both as to the South & North and the Louisville & Nashville. It is conceded by counsel for defendant that neither the charter of the South & North nor the Louisville & Nashville in express terms gave authority to make the relocation of which complaint is made. It is, however, contended that legislative authority was conferred both upon the South & North and Louisville & Nashville to make the change by certain legislation of the General Assembly of Alabama. Section 246 of the Constitution of Alabama of 1901 reads as follows:

"No railroad, canal, or transportation company in existence at the time of the ratification of this Constitution, shall have the benefit of any future legislation by general or special laws other than in execution of a trust created by law or by contract. except on the condition of complete acceptance of all the provisions of this article."

February 18, 1903, the Legislature of Alabama enacted the following statute:

"Section 1. Be it enacted by the Legislature of Alabama, that any railroad corporation owning and operating a railroad in this state, is hereby authorized and empowered to relocate any portion of its line of railroad for the purpose of straightening or otherwise improving the same, and for that purpose, to acquire by gift, purchase or by condemnation in the mode prescribed by law, all necessary rights of way over lands, and to abandon its original or constructed line: Provided, however, that nothing herein contained shall be so taken or construed as to authorize any railroad corporation to change the termini of its railroad, or to make an entire departure from its original line between such termini." Laws 1903, p. 131.

This statute appears in the codification of the Alabama Laws for 1907 as section 3484. The section was amended August 20, 1909, by the addition of other provisions, but the law of 1903 was retained, and reads as follows:

"* * * and may relocate any portion of its line for purposes of straightening or otherwise improving the same and for that purpose, may acquire by gift, purchase or condemnation all necessary rights-of-way over lands, and abandon its original or constructed line, but it shall not change its termini, or make an entire departure from its original line between such termini." Laws 1909, p. 62.

The law last above quoted is the specific authority under which the defendant acted. It is claimed, however, by counsel for the plaintiff,

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that the South & North or the Louisville & Nashville never accepted the Constitution of Alabama within the meaning of section 246 above quoted, so as to be entitled to the benefit of the law of 1903 as amended in 1909. When the Louisville & Nashville took over the operation of the South & North in 1872, for the reason that it had furnished the money to build the road, a general statute of Alabama permitted a corporation owning a railroad to allow another company to operate it, and the question arose as to whether the South & North, having been created under a special charter, was authorized to permit this operation of its road by the Louisville & Nashville, since the South & North had never formally accepted the provisions of the Constitution above quoted, and was not authorized by its special charter or the amendments thereto to permit the operation of its road by another company. Out of this controversy arose the litigation which was involved in Louisville & Nashville R. R. Co. v. State ex rel. Gray, 154 Ala. 156, 45 South. 296. It was decided in this case that a written acceptance was not necessary under the terms of section 246, supra, and that the South & North had accepted the provisions of the Constitution of Alabama, within the meaning of said section, by availing itself of the benefits of the general statutes of Alabama. In the same case the question was raised and decided relative to the right of the Louisville & Nashville, a Kentucky corporation, to take the benefit of the Alabama law, and operate the South & North. There is a provision of the Alabama Constitution of 1901 (section 232) reading as follows:

"No foreign corporation shall do any business in this state without having at least one known place of business and an authorized agent or agents therein, and without filing with the Secretary of State a certified copy of its articles of incorporation or association. Such corporation may be sued in any county where it does business, by service of process upon an agent anywhere in the state. The Legislature shall, by general law, provide for the payment to the state of Alabama of a franchise tax by such corporation, but such franchise tax shall be based on the actual amount of capital employed in this state. Strictly benevolent, educational, or religious corporations shall not be required to pay such a tax."

The Supreme Court of Alabama in the case last cited, after considering the amendments to the charter of the Louisville & Nashville, passed by the General Assembly of Kentucky, March 6, 1878, and January 27, 1880, giving to the Louisville & Nashville authority to take over the operation of the South & North, said:

"Commencing on the 24th day of March, 1887, the defendant (Louisville & Nashville) has done all that foreign corporations are required to do by the Constitution and laws of Alabama to entitle it to do business in the state."

It appears from the record that on May 21, 1907, the defendant filed in the office of the Secretary of State for Alabama a certificate signed by its first vice president, designating Montgomery, Ala., as its known place of business in said state, and appointing George W. Jones its agent upon whom service of process might be made and all legal notices served for all the purposes contemplated by the laws of Alabama. The record also shows that the defendant, prior to the relocation of its line of road, had filed with the Secretary of State of Alabama duly certified copies of its charter, and all amendatory acts relating thereto, as granted and passed by the state of Kentucky. It is further contended,

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however, by counsel for plaintiff, that although the defendant has performed all the acts required by the Constitution and laws of Alabama to authorize it to do business in said state, it does not appear that it has accepted the provisions of the Constitution of Alabama, and was therefore not entitled to the benefit of the relocation statute.

[2-4] We are of the opinion that the Gray Case, holding that no written acceptance of the Constitution is necessary, is binding on us, and that the same facts which were held to show the acceptance of the provisions of the Constitution by the South & North, must be held to show the acceptance by the Louisville & Nashville. It transacted business in the state of Alabama for many years, and availed itself of the benefits of the general statutes of that state. We have no doubt that the defendant having complied with section 232 of the Constitution of Alabama, it is entitled to do business in said state, and that by its conduct and acts, extending over many years, it must be held to have accepted the provisions of her Constitution. The defendant is a corporation of the state of Kentucky, and not, as claimed by plaintiff's counsel, a corporation of both Kentucky and Tennessee, as was held in Goodlett v. Louisville & Nashville R. R. Co., 122 U. S. 391, 7 Sup. Ct. 1254, 30 L. Ed. 1230. The law of Tennessee giving the defendant authority within her limits to construct a railroad between certain points, and to exert some of its corporate powers, recognizes the defendant as a Kentucky corporation. Tennessee Act, December 4, 1851 (Laws 1851–52, c. 23).

[5] The charter of defendant granted by the state of Kentucky does not give authority in express terms to relocate its line of road, but it contains no prohibition against so doing. Hence it could relocate its line of road in the state of Alabama, providing the laws of Alabama permitted it to do so, as the change in the location of a railroad is peculiarly a subject of local control. The Kentucky act of March 6, 1878 (Laws 1877–78, c. 278), gave defendant authority to operate, lease, or purchase upon such terms or in such manner as it deemed best any railroad in any other state or states. It appears also that by subsection 4 of section 768 of the Kentucky statutes, enacted in 1894, it was provided that a railroad company "may, for the purpose of avoiding annoyance to public travel or dangerous or difficult grades or curves, or unsafe or insecure grounds or foundations, or for other reasonable cause, change the location * * * of any portion of its road; but shall not, except as otherwise provided, depart from the general route prescribed in the articles of incorporation." The defendant was entitled to the benefit of this law for the reason that on July 14, 1902, it literally complied with section 190 of the Kentucky Constitution, and also section 570 of the Kentucky statutes, imposing certain conditions upon the performance of which the defendant would be entitled to the benefit of the statute. So it may be truthfully said that the act of relocation by defendant was not only in accordance with the laws of Alabama, but in line with the public policy of Kentucky.

[6, 7] Counsel for the plaintiff further contends that, even if it be held that the defendant was entitled to the benefit of the relocation statute of Alabama, it did not comply with that statute. In order to sustain this position, it is urged that the law provided that there should

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not be an entire departure from the original line of road between the termini of the same, and, in order to make this provision of the law applicable, it is claimed that New Castle and Bangor were the termini of the road; but this contention is not sound. The law means the original termini of the South & North, and not two points on the line between which there is a relocation of the track. The termini of the original South & North were Decatur and Montgomery. There is no merit in this contention. It is also claimed, as we understand the argument, that because the United States granted to the state of Alabama for the benefit of the South & North some of the land upon which the road was constructed, that permission by Congress was necessary in order to lawfully relocate the line of road. There is no merit in such contention. It was a matter for state legislation.

On July 6, 1914, the Railroad Commission of Alabama made the following order:

"Proposed Transfer of Train Service, Louisville & Nashville Railroad Company, from the Old Single Track to the New Double Track, between Bangor, Ala., and New Castle, Ala.

"Whereas, the Railroad Commission of Alabama, by its general order No. 13, dated December 6, 1907, and by its general order No. 17, dated May 3, 1909, provided that:

"'No railroad company operating in this state shall discontinue any passenger train or service now being maintained without the consent and approval of the Commission;' and,

"Whereas, the Louisville & Nashville Railroad Company represents to the Commission that it has and will discontinue certain service heretofore maintained, by reason of the fact that it has and will relocate its line in part, changing the grade, departing entirely from the line heretofore existing between certain points, installing double tracks, discontinuing certain service upon certain portions of the line heretofore existing between Bangor, Alabama, and New Castle, Alabama, as shown by Exhibit A, hereto attached and made a part hereof, and inaugurating in lieu thereof similar service on proposed new double tracks, all of said changes in service and operation having been made and contemplated to be made in conformity with the statutes of Alabama in such case made and provided:

"Now, therefore, the said Railroad Commission of Alabama does hereby consent to and approve of the said discontinuance of service, and the proposed continuance of service, including the proposed rearrangement of tracks, grades, plans, and service as set forth in the said Exhibit A.

"Done by the Railroad Commission of Alabama, at the capital in the city of Montgomery, this 6th day of July, 1914.

"Railroad Commission of Alabama,
"By Chas. Henderson,
"Frank N. Julian,
"Leon McCord,
"Railroad Commissioners."

While the Railroad Commission could not authorize the defendant to relocate its road in violation of the laws of Alabama, the order above quoted is not only persuasive that no such law was violated, but it would seem to be conclusive upon the proposition as to whether the relocation was for the benefit of the public. We have no doubt, upon the facts appearing in the record, that the defendant had legal authority to relocate its line of road as detailed in the evidence. Conceding that the defendant had legal authority to do so, it is further contended by counsel for plaintiff that such relocation breached the contracts arising out of the right of way agreements.

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[8] It appears from the record that, when the South & North constructed its line of road in 1871–2–3, it bought a right of way through six small parcels of land which now constitute a part of the body of 2,600 acres owned by the plaintiff. The right of way deeds or contracts, after reciting the money consideration, contained the following language: "And for further consideration of their building and erecting and running their railroad on and along" the described parcel of land. Not stopping to consider whether these recitals are conditions subsequent or covenants running with the land, we think that under the decision of the United States Supreme Court in Texas & Pacific Ry. Co. v. Marshall, 136 U. S. 393, 10 Sup. Ct. 846, 34 L. Ed. 385, the agreement must be held to have been complied with under the facts in this case. The South & North did build its line of road on and along the lands specified and maintained it for 40 years. It was decided in the Marshall Case, where the contract was to permanently locate car-works and machine shops at the city of Marshall, that the word "permanent" did not mean forever, lasting forever, or existing forever. In this case the railroad company had complied with its agreement for eight years, and it was held to be a substantial compliance with the contract. In Texas & Pacific Ry. Co. v. Scott, 77 Fed. 726, 23 C. C. A. 424, 37 L. R. A. 94, it was said:

"It must be that such an agreement is made subject to the general exigencies of business, the public interest, and to the change, modification, and growth of transportation routes, as these may affect the requirements of the railway company's business."

[9] Something is claimed also in regard to the recital in defendant's deed conveying about 520 acres to the plaintiff. This recital, in addition to the money consideration, reads, "valuable improvements to be put on the land conveyed." In regard to this it may be said that the defendant is not complaining in regard to a failure of consideration, and, standing alone or with the other facts in the case, it does not make out a contract on the part of the defendant to forever maintain and operate its line of road in its then location.

[10] The change in the line of road being, as we have found, lawful, and there being no contract for the continuance of the road in its original location, counsel for plaintiff urges in this situation the proposition that a member of the public has such a vested interest in the continuance of a railroad location that he is entitled, upon its removal, to recover damages either at common law or upon the constitutional guaranty of compensation for property taken for public use. No authority is cited which, in our opinion, sustains the proposition stated, nor have we been able to find any. On the contrary, the rule seems to be established that where there is legislative authority to do an act, omitting for the present cases of the exercise of the power of eminent domain, if in the doing of it harm comes to an individual it is not a wrong for which the law gives a remedy. It is damnum absque injuria. A very instructive case on this question, as it was a case of railroad removal, is Dewey et al. v. Atlantic Coast Line Ry. Co., 142 N. C. 302, 55 S. E. 292. We quote the following excerpt from the opinion of the court:

"The defendants, having legislative authority to make the proposed change, are acting within their right. So far as now appears, they are only doing, or

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proposing to do, 'a lawful thing in a lawful way,' and in such case, if harm comes to a third person, it is not a wrong for which the law will afford redress. It is damnum absque injuria. Thomason v. Railway Co., 142 N. C. 318, 55 S. E. 205 (plaintiff's appeal at this term); Broom's Legal Maxims (8th Ed.) p. 200; Pollock on Torts (7th Ed.) pp. 126, 127; Am. & Eng. Ency. (vol. 8) p. 697. The doctrine is well stated in this last citation as follows: 'It may be stated as a general rule that if the Legislature, acting within its constitutional limitations, directs or authorizes the doing of a particular thing, the doing of it in the authorized way and without negligence cannot be wrongful. If damage results as a consequence of its being done, it is damnum absque injuria, and no action will lie for it.' * * *

"It is not necessary, however, that the power to change a route should be given in the charter or a direct amendment thereto; but, as stated in one of the authorities, 'it may be given by charter or by special enactment, or by the general railroad laws of the state.' * * *

"Where, as in this case, the railroads are proceeding to do an authorized act, and in a lawful manner, there is no legal wrong done the plaintiffs, and the judge below was right in denying relief. There is no error, and the judgment below is affirmed."

In Jones v. Newport News, 65 Fed. 736, 13 C. C. A. 95, the Court of Appeals of the Sixth Circuit, Judge Taft delivering the opinion of the court, said:

"The proposition put forward on plaintiff's behalf is that when a railroad company permits a switch connection to be made between its line and the private warehouse of any person, and delivers merchandise over it for years, it becomes part of the main line of the railroad, and cannot be discontinued or removed, and this on common-law principles and without the aid of a statute. It may be safely assumed that the common law imposes no greater obligation upon a common carrier with respect to a private individual than with respect to the public. If a railroad company may exercise its discretion to discontinue a public station for passengers or a public warehouse for freight without incurring any liability or rendering itself subject to judicial control, it would seem necessarily to follow that it may exercise its discretion to establish or discontinue a private warehouse for one customer."

Another leading case to the same effect is College Arms Hotel Co. v. Atlantic Coast Line Ry. Co., 61 Fla. 553, 54 South. 459. In this case it was said:

"Persons who own property at a town adjoining a railroad depot, and who, relying upon the continuance of the depot at the place, have improved the property, and 'have enjoyed special facilities in the conduct of their business' incident to such location, have no right, on the ground of special and peculiar injury to their property rights, to enjoin the enforcement of an order of the railroad commissioners for removal of the depot to another point at the town. * * * Property losses incident to the removal of a depot, that result in consequence of the exercise of lawful authority, do not afford a right of action, where no trespass is committed upon private property. In the authorized removal of a depot no law is violated, as in case of excessive charges or unjust discriminations."

The plaintiff having no contract, either express or implied, that the defendant would continue to maintain its road and run its trains, and the railroad having been constructed by legislative authority for the benefit of the public, and not for the particular benefit of any individual composing the public, there is no breach of contract or breach of duty, and hence no right of action. Kinealy, etc., v. St. Louis, etc., Ry. Co., 69 Mo. 658.

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[11] We will now consider the case with reference to the eminent domain theory. The Constitution of Alabama provides (section 235, art. 12) as follows:

"Municipal and other corporations and individuals invested with the privilege of taking property for public use shall make just compensation, to be ascertained as may be provided by law, for the property taken, injured, or destroyed by the construction or enlargement of its works, highways, or improvements."

The defendant did not take, injure, or destroy any property of the plaintiff by the construction or enlargement of its works, highways, or improvements, within the meaning of the Constitution. On this question Nichols, in his work on the Power of Eminent Domain, at section 142 uses the following language:

"An owner of land has no private rights in the continued existence of any public work other than a highway on or over his land. No action lies when a state capitol (Edwards v. Lesueur, 132 Mo. 410, 33 S. W. 1130, 31 L. R. A. 815, or a college (Bryan v. Board of Education, 151 U. S. 639, 14 Sup. Ct. 465, 38 L. Ed. 297) is moved away, when water pipes (Asher v. Hutchinson, etc., Co., 66 Kan. 496, 71 Pac. 813, 61 L. R. A. 52) in the streets are removed, or when a railroad (Kinealy v. St. Louis, etc., Ry. Co., 69 Mo. 658; Rockafeller v. Northern Central Ry. Co., 212 Pa. 485, 61 Atl. 960), or canal (Fox v. Cincinnati, 104 U. S. 783, 26 L. Ed. 928; Trustees v. Brett, 25 Ind. 409; Fishback v. Woodruff, 51 Ind. 102; Whitney v. New York, 96 N. Y. 241; Hubbard v. Toledo, 21 Ohio St. 379; Little Miami Co. v. Cincinnati Railroad Co., 30 Ohio St. 629; Commonwealth v. Pennsylvania Railroad, 51 Pa. 351; Fredericks v. Pennsylvania Canal Co., 109 Pa. 50, 2 Atl. 48; see, also, In re Water Front, 190 N. Y. 350, 83 N. E. 299, 16 L. R. A. [N. S.] 335), is discontinued, provided the change is made by authority of law."

Mills on Eminent Domain, § 317; Asher v. Hutchinson Water Line & Power Co., 66 Kan. 496, 71 Pac. 813, 61 L. R. A. 52; Fox v. Cincinnati, 104 U. S. 783, 26 L. Ed. 928. We find no merit in this contention.

[12] It is next urged that the court erred in allowing defendant to withdraw its plea in abatement and file an answer to the complaint. On plaintiff's own theory a plea in abatement was an unauthorized pleading in Missouri, and it was entirely within the discretion of the court to allow it to be withdrawn and an answer to be filed as a matter of common justice.

[13] It is next urged that the court erred when it directed a verdict for the defendant because it asked one of the jurors only to sign the verdict. The juror who was so requested signed it, and it is claimed that it is not such a verdict as will support the judgment. It is urged that whether a case is submitted to a jury on the facts or whether the court directs a verdict the jury must act, and that there can be no verdict without the whole jury acts. It is usual for the trial judge, when a verdict is directed, to ask the jury to select a foreman to sign the formal verdict, but the whole proceeding is a mere matter of form. The record shows that the juror who signed the verdict was the foreman, and we conclude that the request by the court that the juror sign the verdict, being a mere matter of form, was entirely sufficient without the jury selecting their own foreman. The jury could not act contrary to the decision of the court. All they could have done would have been to all sign the verdict or select a foreman to sign it for them.

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The verdict returned appears to be signed by the foreman, and whether the court or jury named the foreman would in no way prejudice the plaintiff.

We have considered all the points argued by counsel, and are of the opinion that the judgment below must be affirmed; and it is so ordered.

(244 Fed. 662)

THE ROBERT M. THOMPSON.

THE AUGUSTA W. SNOW.

(Circuit Court of Appeals, Second Circuit. April 17, 1917.)

Nos. 229, 230.

1. COLLISION ⚷83—STEAM AND SAILING VESSELS—EXCESSIVE SPEED IN FOG.
The steamship Thompson and the schooner Snow, on crossing courses, were in collision 50 miles off Cape Henry, in a dense fog. The Thompson was going at a speed of from 6 to 10 miles an hour, and the Snow at a speed of about 5 miles, with all sails set and drawing, which was not necessary to give her steerageway. The Thompson heard the fog signals of the Snow apparently on her starboard bow, but her captain could not be certain of the direction, and kept on until in sight of the Snow, when it was too late to avoid collision. *Held*, that both vessels were going at excessive speed, in violation of article 16 of the International Rules, Act Aug. 19, 1890, c. 802, § 1, 26 Stat. 326 (Comp. St. 1916, § 7854), and the Thompson also violated such rule in failing to stop and navigate with caution on hearing the fog signals of the Snow; that it could not be said that the excessive speed of the Snow did not contribute to the collision, and that both vessels were in fault and liable therefor.

2. COLLISION ⚷82(3)—FOG—"MODERATE SPEED."
A sailing vessel navigating in a dense fog, with all sails set and drawing, and making her best speed under the wind conditions, is not going at the "moderate speed" required by article 16 of the International Rules, and in case of collision can exonerate herself from liability only by affirmatively showing that her excessive speed could not have caused or contributed to the collision.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Moderate Speed.]

Appeals from the District Court of the United States for the Southern District of New York.

Suit in admiralty for collision by Smith Shipping Company, Incorporated, owner of the schooner Augusta W. Snow, against the steamship Robert M. Thompson, American Transportation Company, claimant, with cross-libel. Decree for libelant, and claimant appeals. Modified.

The following is the opinion of Mayer, District Judge:

These are cross-actions arising out of a collision between the schooner Augusta W. Snow (hereinafter called the Snow) and the steamer Robert M. Thompson (hereinafter called the Thompson) on April 1, 1914, in a dense fog, about 50 miles east of Cape Henry, Va. The Snow was bound from Jacksonville, Fla., to New York, with a cargo of yellow pine lumber; the Thompson was bound from Philadelphia to New Orleans, La., by way of Charleston, S. C. Each vessel charges the other with excessive speed, de-

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⚷For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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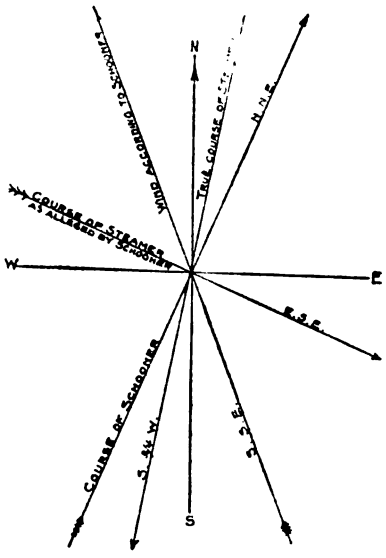
fective lookout, and bad steering. All the testimony was taken on depositions, and presents the usual conflict as to vital questions of fact.

The theory of the Snow is that the Thompson, while proceeding at an excessive rate of speed, changed her course, and, instead of passing the Snow port to port, attempted to cross the latter's bow, a situation which could have been avoided by timely stopping and reversing of engines. The Thompson's theory is that the Snow, while going at an excessive rate of speed, luffed, and was allowed to take a sheer to starboard just prior to the collision, thus striking the Thompson at an angle of about 45 degrees. These theories may be illustrated by rough drawings, as follows:



The contentions of both sides as to the failure to give seasonable and adequate fog signals may be dismissed at the outset.

The first question requiring consideration is the speed of the respective vessels. Unfortunately, there is a divergence in the testimony as to the time of collision; the Snow contending, in substance, that the collision did not occur any later than 1 p. m., while the Thompson contends that it happened about 1:19 p. m.

Speed of the Snow.

The witnesses for the Snow, except her master, were examined prior to the examination of those for the Thompson, the first being Delk, the mate. Delk took the wheel at 12:30 p. m., and estimated that the schooner was going "about 5 miles an hour on an average, an hour." Upon being asked how he knew this, he said, "I could see, going through the water I can see whether she is going 8 or 5 miles; we had a log, the log will tell." By this he meant, of course, that if his estimate was wrong the reading of the log would correct him. He then said that at noon the log registered "about" 44, and that at the time of the collision or immediately thereafter the log registered "about" 48½, thus indicating a speed of "about" 4½ miles per hour, up to the time of the collision. Upon further examination, Delk, relying on his memory, testified that at 8 o'clock in the morning the reading was 22, "if I am not mistaken," and 44 at 12 o'clock (thus showing an average of 5½ knots from 8 to 12), and 98 at the midnight previous, "if I am not mistaken" (the log starting over again every hundred).

The substance of the testimony of Capt. Armstrong, the master of the Snow, is that her speed was a little less than 4 knots. He testified that he looked at the log (taffrail) at 12 o'clock and found it on 44; that the log was taken out of the water after the collision, examined, put away, and brought to New York, where it was taken to the store of John Bliss & Co., makers of nautical instruments and the makers of this log. There, Armstrong says, it was examined, and it showed a registration at 47.9. (The Bliss affidavit is, of course, inadmissible.) If the collision was at 1 p. m., the above readings would show a speed of 3.9 knots per hour (not 3.7, as Armstrong testifies at page 97 for instance. Probably this is a typographical error.

But the libel puts the collision at 12:50. Too much importance is not to be accorded to the mere fact that the libel states 12:50, because often an inadvertent error is made in pleadings, with only rough data in the hands of the proctors; but, in this instance, Armstrong gave the time as 12:50 to his owners (page 120). If, therefore, the collision occurred at 12:50 instead of 1 p. m., and if the log read at 44 at exactly noon, and at 47.9 at

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exactly the time of collision, then the Snow went 3.9 knots in 50 minutes, or $^5/_6$ of an hour, thus showing (if I figure correctly) a speed of 4.68 per hour, or, in round numbers, 4.7 knots per hour.

The logbook of the schooner, which was kept in the mate's room, was lost, and there is no reason to question the testimony as to its loss. The captain, however, kept "a kind of scratch log," part of which was written up before the collision and part filled out afterwards when he arrived at Newport News. (Libelant's Exhibit 3 for identification.) The captain was examined and cross-examined concerning this "scratch log," and in so far that log is before the court. He testified that the last entry in the log was made just after 12 o'clock, and his attention was called to the fact that the figures 50 in the entry 12:50 appeared to have been changed. He admitted that the 50 looked "a little different from the 12," but could not tell whether that was done at the time he wrote it or when it was done. Some sparring was engaged in by the proctors as to the admissibility of this paper. For the purposes of this particular point, it is not important whether the paper be admitted in evidence or not. If in evidence, it is apparent on inspection that some change has been made in the 50. If not in evidence, the attention of the captain was called to the matter, and, as above stated, he admitted that the figures 50 look "a little different from the 12" which precede them.

Campbell, the cook on the schooner, whose testimony shows intelligence, estimated that the collision occurred between 12:45 and 1 o'clock. In one part of his testimony Capt. Armstrong stated: "After the collision, the steamer swung alongside. It wasn't a minute. I took my (Howard) watch out. It was just 1 o'clock (Eastern standard time), and I called the mate's attention to it." I would say the collision occurred "one minute to 1—one or two minutes before 1." He was then asked, "Might it have been five minutes to 1?" and he answered, "Well, that is a time when a man can't tell very closely, because my attention was to getting the sails in." In any event, the captain looked at his watch *after* the collision, and we all know how easily we are deceived as to short lapses of time, especially in a moment of emergency or excitement.

Upon the testimony, it is impossible to determine with absolute accuracy the precise moment when the collision took place, but, reading all of the testimony together, I am much influenced on this point by the testimony of Delk, the mate, who for about 22 years had served on sailing vessels, and whose testimony, having been taken at the very beginning of the litigation, seems to have the ring of truth. Taking into consideration the calculations which I have set forth, and all the testimony relating thereto, the taffrail log and the captain's scratch log, I am satisfied that Delk was substantially right when he said that the Snow was going about 5 miles on an average, and about 4½ miles from 12 o'clock up to the time of the collision. The probabilities are that she was going close to 5 miles an hour (perhaps a trifle above or under), and this conclusion is fortified by the fact that the Snow was carrying all of her sails, including five head sails, that these sails were drawing full, and that the schooner was making all the speed she could with the wind she had (page 122). Nearly all the witnesses testified that the wind was freshening throughout the day, although Capt. Armstrong testified that there was a gradual decrease in the wind shortly before the collision.

There has been a good deal of discussion as to the conclusions to be drawn from the wind conditions reported by the United States weather bureau at Cape Henry, and as they appear in the logs of the warships Delaware and Kansas; but, in view of the distance of the place of collision from Cape Henry and from the warships, any conclusions based on these data would be affected by a large element of speculation. There is nothing accurate about the velocity of the wind over a large area, and a decrease or moderation at one point will not necessarily be duplicated at the same time at a point some miles away.

Experience has demonstrated that the best source of information upon a question of fact such as this is the credible testimony of seasoned men who are on the scene; and, on all the evidence, I am not satisfied that there was so marked a decrease as materially to reduce the speed of the Snow so as to get it down below (in any event) 4½ knots.

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I am not unmindful of the testimony of the witnesses called on behalf of the Thompson, who estimated that the Snow was making 7 or 8 knots an hour, but, after all, these are estimates of interested witnesses on another vessel, made within a short time and under circumstances which do not assure certainty and I prefer to arrive at my conclusions on the testimony of the witnesses of the Snow with the fair inferences which follow from that testimony.

Having concluded, therefore, that the schooner made about 5 knots an hour, the next question is whether she was compelled so to do in order to keep her steerageway. Delk testified that the vessel was a "good steering vessel," and that he supposed she would have steerage at 3 knots, but it would take half an hour to answer the helm, and that he supposed he could hold her on her course at 3 knots (page 40). Armstrong, the captain, testified that in a rough sea he would want 3 or 4 or 4 or 5 knots, while in a lighter sea he could hold the course with a knot and a half or 2 knots; that is, when he had a comparatively smooth sea and a moderate wind (page 149). He also thought that it would not make much difference whether the schooner was light or loaded, although under some circumstances she would hold her course better light than loaded. He testified further that he could have maintained steerageway with less speed, but "we could not avoid running into anything as quick with less steerageway as we could the way we were going; our vessel would not mind our helm as quick" (page 100). "I think," he continued, "we should have as much steerageway as that (meaning the rate at which the Snow was going on the day of the collision) in order to avoid running into any object that might be ahead of her" (page 101).

I am satisfied that the Snow could have kept her course at 3 knots an hour, or, in any event, at between 3 and 4 knots an hour; and that when she proceeded at the rate of about 5 knots an hour, with all her sails set, she was also going at a speed in excess of her necessities for steerageway, and certainly in excess of her duty in a fog as dense as all witnesses agree that this fog was. The mere fact that she was going with all sails set strongly suggests a rate beyond the requirements of steerageway.

Speed of the Thompson.

If the time of the collision was 12:50 p. m., then on the testimony of the Thompson's officers, and as to the events before that time, it is apparent that the Thompson's speed was somewhere between 6 and 10 knots an hour, and obviously excessive. But timepieces often differ, both on land and sea, and the more satisfactory approach is to analyze the situation on the time as kept on the Thompson and testified to by her witnesses.

From 12:30 p. m., when the chief officers of the Thompson went below, to 12:49 p. m., the Thompson was making her full speed of 10 knots an hour (Brown, pp. 5, 49–50; Cavileer, p. 36). Although, according to Capt. Cavileer, of the Thompson, the fog at about 12:45 was "very dense" (page 37), and according to Brown, the engineer, it was "pretty thick," so that he "could see nothing ahead at all," and could see only "the length of the ship," but not "beyond that") Brown, pp. 49, 50), the vessel was permitted to keep on at full speed for at least 19 minutes.

It is true that at 12:30 the order was given to the engine room to "stand by," but that order at best minimizes, but does not avert, the danger of collision in a dense fog.

Of course, it is true that antecedent carelessness is of no consequence from the standpoint of fault, if not a contributing cause of collision; but this conduct on the part of the Thompson is of service in determining the truth as to the speed of the vessel at and just before the collision.

At 12:49 p. m., according to the engineer's log, there was a signal for stop, although Brown, the chief engineer, does not seem to have an independent recollection of the time of the order (page 31). At 12:53 p. m. there was a signal for half speed ahead (Brown, p. 31); but, as the engines were not reversed, the Thompson would still be going ahead when Brown received the half-speed order (page 32). Brown said, "At the end of 4 minutes (12:49–12:53) I *guess* she would be going about 3 knots *or thereabouts*;" while Capt. Cavileer

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thought she was going "probably five mile an hour—that is, only roughly estimated" (Cavileer, p. 39).

The half speed would, according to Brown, "pick us up to *about* 6" (page 33), and it would take only about 2 minutes to bring the Thompson up from 3 knots to half speed, i. e., about 5 knots. From about 12:55 p. m., therefore, the Thompson was going at least at the rate of 5 knots; and in view of Brown's estimate of "about" 3 knots or "thereabouts," and Capt. Cavileer's rough estimate of 5 knots at 12:53, it is safe to say that at 1 o'clock, when the next stop order was received in the engine room, the Thompson was going better than 5 knots. The next signal was full speed ahead at 1:12, and meanwhile the Thompson, according to Brown, was making only one knot an hour or almost stopped; but at 1:12 p. m. Brown again received an order for full speed ahead, and a stop order at 1:15 p. m., and Brown admitted that at 1:15 p. m. he was going full speed. Again, the Thompson stopped, this time at 1:18 p. m., when she started half speed ahead, and the collision occurred according to Brown and Vogel, the second assistant, "about" 1:19.

If the testimony of the engineers is taken, the conclusion is irresistible that at the time of the collision the Thompson was going at somewhere from 5 to 6 knots an hour. If the captain's testimony (page 9) is taken to the effect that the collision occurred when the engines were full speed ahead, then she was going 10 knots for 7 minutes, i. e., from 1:12 to 1:19. Contradictions are sometimes the best indication of truth, but not always, and in this case, on this vital question of speed, the Thompson's story is very unsatisfactory. I cannot escape the conclusion that the Thompson was going either about 6 or about 10 knots per hour for some minutes before the collision, and this conclusion is reached without considering the estimates of some of those on the Snow. The answer "No" of Lawson, the Snow's lookout, to the question, "You couldn't tell whether the steamer was going ahead or not, could you?" is not significant. The question, in a sense, was casual, but, if taken at full value, it is merely an instance of the well-known experience that at the moment of emergency (and especially in a fog at sea) it is difficult to recall the precise movement of another vessel.

The Navigation of the Snow.

Lawson, an able seaman, who had followed the sea for five years, was stationed at the forecastlehead, keeping lookout and blowing the horn. He heard a whistle off his port bow (page 44) and then a second blast half a minute or a minute after (page 45). After these two blasts, Lawson heard several whistles before and several after he saw the Thompson. The Thompson blew one-blast signals after Lawson saw her, and these were answered by three blasts from the Snow. Lawson, who remained on the forecastlehead (page 53), reported the first whistle to the mate, but not the subsequent signals. There was not any necessity for Lawson to do any more, and fault cannot be attributed to the Snow on account of her lookout.

As to the movement of the vessels, the testimony of Delk seems trustworthy. As stated supra, he was an experienced man, was examined before the cross-libel was filed, and his answers seem neither cocksure on the one hand nor indefinite on the other. Shortly before the collision he heard the whistles of a steamer, but "they sounded far off, * * * one was on the starboard quarter one was about abeam" (Delk, p. 7). Capt. Cavileer, of the Thompson, testified that at 12:48 he heard a steamer's whistle off his port bow, and at 12:53 that he heard the same whistle, which was then abeam (Cavileer, pp. 5 and 6). Apparently, therefore, the two whistles of the same steamer were heard on both vessels. Thereafter, and about 2½ minutes before the collision, Delk heard another whistle about three points off his port bow, and shortly after that another, which sounded almost ahead, it being one long blast, and soon thereafter the Thompson loomed up out of the fog across the Snow's bow. When the Thompson loomed up out of the fog, she blew two blasts. As soon as Delk saw the Thompson he put "the wheel hard up, and the captain came and gave me a hand, and we put it hard astarboard" (Delk, p. 9). This maneuver would, and according to Delk did, send the Snow to port.

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The Snow struck the Thompson on the starboard side. The Snow sank, floating on her lumber. The Thompson was out of sight in a few seconds, and did not stand by and offer assistance. Lawson, the lookout, Campbell, the cook, Barton, a passenger, and Capt. Armstrong, corroborated Delk on the point that the Thompson's whistle sounded off the port bow of the Snow. Capt. Armstrong testified that at the time of the collision he was at the wheel, that he saw the compass every half minute and at the time of the collision, was looking right at it, that the course was N. N. E., and had not been changed. He further said that, as soon as the Thompson was crossing the Snow's bow, he told the mate to put his wheel hard astarboard, and caught hold of the wheel in order to assist Delk to do this quickly; that the course of the Snow might have been changed by this maneuver, but not enough to notice. "In fact, we came together so quick the compass didn't have a chance to angle the vessel; if the vessel swung off, the compass didn't change any; she might have changed a little, but very little" (Armstrong, p. 96). In the opinion of Armstrong and Delk, the Thompson was heading E. S. E. at the time of the collision, at an angle of about 45 degrees. I am satisfied that the Snow held her course, with possibly some very slight and immaterial change practically at the moment of collision.

The Navigation of the Thompson.

An appreciation of the situation with which the captain of the Thompson was confronted may be summed up in a reference to his testimony on cross-examination (page 40): "Q. In your direct examination you said, 'Apparently on our starboard bow.' You are not positively sure, are you, that you heard it off your starboard bow? A. In my direct examination I said that the first I heard of the horn was very indistinct, and appeared to be on our starboard bow, but I could not quite detect where it was or what it was." It thus appears that although the master of the Thompson heard the fog horn of the Snow, and although he was not sure of her location or of the direction in which she was going, nevertheless he did not stop for a continuous period nor did he reverse his engines.

After the Snow came in sight, Capt. Cavileer said he starboarded his helm, then ported, and put his helm amidships. The helmsman, Belish, contradicted the captain, saying that he kept the wheel over "to the left" right up to the time of collision, and "didn't turn the wheel amidships at all" (page 104). But, assuming the captain's recollection to be correct, these confusing maneuvers were indulged in undoubtedly because of the fear of the captain that he would throw his stern in the path of the Snow, and, naturally, when the dangerous situation was apparent, he was endeavoring to do everything in his power to avoid collision. It is by no means unlikely that these changing maneuvers, hurriedly executed, gave to the witnesses on the Thompson the impression that the Snow luffed; but luffing by the Snow would be so unusual, in the circumstances, that it would require a great deal more than is presented in this testimony to carry that suggestion into conviction. The truth of the matter is that, proceeding at an excessive rate of speed, the Thompson came upon the danger much sooner than was expected, and in the alarming surprise her captain was compelled to try to avert collision in a very small space of time. Under the circumstances, these maneuvers cannot be said to have taken place in extremis, for the captain brought the situation on himself by reckless speed, when it would have been easy to stop and reverse.

Shanks, the first officer, did not make a very good witness, but I am reluctant to believe that this was anything more than the poor showing which men of this kind sometimes make when in the hands of lawyers. Shanks had an experience on the sea of 28 years, and for 9 years held a master's license for all ocean, steam, and sail, and it is difficult to believe that such a man would not know the simple movements of the helm and the simple results therefrom. Belish, the wheelsman, was an Austrian, unable to speak English; but I do not see that he made any error, but, on the contrary, simply did the physical acts which carried out the instructions of his superiors. I think in his case the criticism of the proctors for the Snow is largely based upon his

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lack of knowledge of the English language. It may very well be that it would be wiser to employ, for positions of this kind on a vessel commanded by officers who speak English only, men who also can understand English; but, as I am unable to see that Belish made any mistake, I think that his lack of knowledge of the language is a matter of no consequence. The same observations may be made as to Siguro.

While I think that no fault is attributable to Belish or Siguro in the performance of their duties, yet their testimony, when read in the light of that of the captain and others on the Thompson, is so muddled and unsatisfactory that the Thompson has failed to carry the burden of proof which rests upon her to free herself from fault. On the other hand, the testimony on behalf of the Snow (with the exception of Armstrong's testimony as to the 12:50 entry, and possibly his testimony as to decrease of the wind velocity) is, in substance, clear and satisfactory.

From the foregoing it has already appeared that I am of opinion that both the Thompson and the Snow were proceeding at an excessive rate of speed, in view of the pending conditions. It is quite clear from the testimony that very little deviation would have avoided the collision. Shanks testified that the courses were practically parallel, and that "she (the Snow) would have gone clear of us the way she was going when I first saw her"; and, in effect, he attributed the collision to the luffing of the Snow. Capt. Cavileer testified that the Snow was "about one point of being parallel with our course," and that she was heading a point toward the Thompson. In answer to the question as to whether it appeared that the Snow at that time, if she held her course, would come into collision or go clear, he answered, "It appeared that she would clear me, * * * cross my stern, * * *" would go "under my stern" (pages 14 and 15), and he also attributed the collision to the luffing of the Snow. Capt. Cavileer further testified as follows: "Q. When you first saw the schooner she was heading in the direction which would lead right into the steamer, which I observe from your exhibit marked Exhibit K? A. Not right into her; no. Q. Well, I will ask you to look at that exhibit, Captain. A. Witness does so. Q. If your steamer was stopped at that time, and the schooner continued her course, she would have run into the steamer, wouldn't she? A. No, sir. Q. Pretty close to it? A. She would have come close to it, but she wouldn't have touched. Q. How far away would she come? A. From 100 to 150 feet. Q. The schooner would come pretty close to your steamer, wouldn't she? A. She would come from 100 to 150 feet from us" (pages 46, 47).

Finally, it is earnestly insisted upon behalf of the Thompson that the location of the vessels, as shown by various diagrams, supports the theory that the Snow was at fault; but I think that the testimony fully bears out the theory of the Snow that the position of the vessels and their course was as indicated in the rough diagrams supra.

The conclusion is unescapable that, by the exercise of caution on the part of the Thompson, the collision could have been avoided, and the real question in the case is whether, because of her excessive speed, the Snow is to be condemned for contributing to the collision.

The International Rules of Navigation, as far as here applicable, are (stated for convenience) as follows:

"Art. 16. Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard for the existing circumstances and conditions. A steam vessel hearing apparently forward of her beam, the fog-signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."

"Art. 20. When a steam vessel and a sailing vessel are proceeding in such directions as to involve risk of collision, the steam vessel shall keep out of the way of the sailing vessel.

"Art. 21. Where, by any of these rules, one of two vessels is to keep out of the way the other shall keep her course and speed.

"Note.—When, in consequence of thick weather or other causes, such vessel finds herself so close that collision cannot be avoided by the action of the

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giving-way vessel alone, she also shall take such action as will best aid to avert collision."

"Art. 23. Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse."

It is unnecessary to repeat at length the principles which the courts have frequently announced in connection with the speed of vessels in a fog. It was clearly the duty of the Thompson, in view especially of the doubts entertained by her captain, either to slacken her speed to a rate considerably under that which she was going, or to stop or to reverse, and, had her captain done any one of these three things, the collision would, in all probability, not have happened.

In considering the liability of the Snow, it is, of course, necessary to ascertain what difference, if any, a slower speed would have made in the particular situation here under consideration. The proposition involved is concisely and aptly stated by Sir James Hannen in The Zadok, 9 P. D. 114 (1883), in referring to article 13 of the "Regulations for Preventing Collisions at Sea": "It was the duty of both vessels to note article 13, to go at a moderate speed, and it appears to me that the object with which that rule of conduct is imposed is not merely that vessels should go at a speed which will lessen the violence of a collision, but also that they should go at a speed which will give as much time as possible for the making of any proper maneuvers which may become necessary under unforeseen circumstances; for, in a fog, it cannot be told exactly from what quarter the danger may come."

The Snow kept her course and speed, and I am satisfied that a slightly less speed, of say a knot an hour, would not have enabled her to clear the Thompson. In any event, in view of the Thompson's conduct, I am not convinced that the collision could have been prevented if the Snow had been running at say 4 knots at the time when the Thompson loomed up out of the fog.

Of course, as the cases have repeatedly pointed out, it is neither possible nor advisable to lay down any rigid rule as to the precise rate of speed at which a vessel shall proceed in a fog. There are some rates which are obviously dangerous, but there are other rates on the border line, such as the Snow's in this case, where the determination of fault must rest upon all the surrounding conditions and circumstances.

It would unnecessarily extend this opinion to analyze case by case, but, from a reading of the many cases cited in the briefs, the principle generally adhered to and certainly followed in this circuit is that sailing vessels should lessen speed in a dense fog down to the rate at which they may maintain steerageway.

Generally speaking, it would seem that where sailing vessels have gone over 5 knots they have been condemned, and where they have gone about 4 knots or under they have been freed; but in each case, naturally, there has been a series of facts which in some one or more particulars differed from those in some other case. In The Chelsea (D. C.) 135 Fed. 616, for instance, the fog was not thick at the beginning, and when the vessel entered the dense fog she was reducing sail. In The Chattahoochee, 173 U. S. 540, 19 Sup. Ct. 491, 43 L. Ed. 801, the sailing vessel was going at 7 miles an hour southeast of Nantucket Shoals. Mr. Justice Brown said at page 548: "No absolute rule can be extracted from these cases. So much depends upon the density of fog, and the chance of meeting other vessels in the neighborhood, that it is impossible to say what ought to be considered moderate speed under all circumstances. It has been said by this court, in respect to steamers, that they are bound to reduce their speed to such a rate as will enable them to stop in time to avoid a collision after an approaching vessel comes in sight, provided such approaching vessel is herself going at the moderate speed required by law. It is not perceived why the considerations which demand a slackening of speed on the part of steamers in foggy weather are not equally persuasive in the case of sailing vessels. The principal reason for such reduction of speed is that it will give vessels time to avoid a collision after coming in sight of each other. If two steam vessels are approaching upon converging

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courses at a combined rate of speed of thirty miles an hour, and are only able to see each other three or four lengths off, it would be practically impossible to avert a collision; whereas, if each were going at the lowest rate of speed consistent with good steerageway, a collision might easily be avoided by stopping and reversing their engines, or by a quick turn of the wheel and an order to go ahead at full speed. While sailing vessels have the right of way as against steamers, they are bound not to embarrass the latter, either by changing their course or by such a rate of speed as will prevent the latter from avoiding them. There is also the contingency that a schooner sailing with the wind free, as in this case, may meet a vessel closehauled, in which case the latter has the right of way, and the former is bound to avoid her. Beyond this, however, a steamer usually relies for her keeping clear of a sailing vessel in a fog upon her ability to stop and reverse her engines; whereas, it is impossible for a sailing vessel to reduce her speed or stop her headway without maneuvers which would be utterly impossible after the two vessels come in sight of each other. Indeed, she can do practically nothing beyond putting her helm up or down to 'ease the blow' after the danger of collision has become imminent. The very fact that a sailing vessel can do so little by maneuvering is a strong reason for so moderating her speed as to furnish effective aid to an approaching steamer charged with the duty of avoiding her."

While in The Nacoochee, 137 U. S. 330, 338, 11 Sup. Ct. 122, 34 L. Ed. 687, the Supreme Court disregarded the argument that the schooner was sailing too fast because not averred in the answer and not found by the court below, yet the principles stated by Mr. Justice Blatchford are of guidance in the case at bar. Among other things he said, at page 338 of 137 U. S., at page 124 of 11 Sup. Ct. (34 L. Ed. 687): "The steamer was bound to keep out of the way of the schooner, and the burden rests upon her to show a sufficient reason for not doing so. She must be held wholly responsible, unless she shows a fault on the part of the schooner which contributed to the collision, or that it was due to unavoidable accident. The latter is not shown, and it is shown that the steamer was not going at a moderate speed in the fog. It is found that the steamer first sighted the schooner when the latter was about 500 feet distant, and that the fog was dense and hung low down over the water. The steamer, from her own course and that of the schooner, when the former overhauled and passed the latter, must have known, by the lapse of time before she heard the supposed sounds of distress, that when she changed her course, by porting 13½ points, to south-southeast, it was quite likely she would encounter the schooner. She was bound, therefore, to observe unusual caution, and to maintain only such a rate of speed as would enable her to come to a standstill, by reversing her engines at full speed, before she should collide with a vessel which she should see through the fog. This is the rule laid down by this court in the case of The Colorado, 91 U. S. 692, 702 [23 L. Ed. 379], citing The Europa, 2 Eng. Law & Eq. 557, 564, and 14 Jurist, pt. 1, 627, and The Batavier, 40 Eng. Law & Eq. 19, 25, and 9 Moore P. C. 286. The rule laid down in the last-named case is that at whatever rate a steamer was going, if she was going at such a rate as made it dangerous to any craft which she ought to have seen, and might have seen, she had no right to go at that rate. See, also, The Pennsylvania, 19 Wall. 125, 134 [22 L. Ed. 148]."

While excessive speed in a fog on the part of a sailing vessel is to be condemned, it cannot, in a particular case between given litigants, be considered a fault academically, and it is merely repeating a trite principle to say that the inquiry must be whether the violation of a rule of conduct, statutory or otherwise, was the sole or a contributory cause of the disaster.

As the Thompson was clearly at fault, and as the Snow, though going at an excessive rate of speed, was otherwise properly navigated, and as the rate at which the Snow was going did not contribute to the collision, the Snow may have a decree with costs, and in the cross-action a decree dismissing the libel with costs.

Settle decree on five days' notice.

On appeal from a final decree of the United States District Court for the Southern District of New York holding the steamship Robert

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M. Thompson solely at fault for a collision which occurred between her and the schooner Augusta M. Snow on April 1, 1914, at a point about 50 miles east from Cape Henry, Va. The collision occurred between 12:50 and 1:15 p. m., a dense fog prevailing at the time.

Harrington, Bigham & Englar, of New York City (D. Roger Englar, of New York City, of counsel), for appellant.

MacFarland, Taylor & Costello, of New York City (Willard U. Taylor and Alfred Strickland, both of New York City, of counsel), for appellee.

Before COXE, ROGERS, and HOUGH, Circuit Judges.

COXE, Circuit Judge. [1, 2] The District Judge has stated the facts fully and accurately in his opinion and they need not be repeated here except as they bear upon the speed of the Snow. The conclusion of the District Judge is stated at the close of his opinion as follows:

"As the Thompson was clearly at fault, and as the Snow, though going at an excessive rate of speed, was otherwise properly navigated, and as the rate at which the Snow was going did not contribute to the collision, the Snow may have a decree with costs, and in the cross-action a decree dismissing the libel with costs."

We are entirely satisfied with the opinion of the District Judge regarding the navigation and liability of the Thompson and, therefore, need spend no time in considering that branch of the controversy.

The important question for us to determine is—Was the Snow guilty of negligence? The court after reviewing the testimony reaches the conclusion that the Snow was making about 5 knots an hour, that she could have kept her course at 3 knots an hour and that when she proceeded at the rate of about 5 knots an hour, with all sails set, she was going faster than was necessary to maintain steerageway, "and certainly in excess of her duty in a fog as dense as all witnesses agree this fog was. The mere fact that she was going with all sails set strongly suggests a rate beyond the requirements of steerageway."

The District Judge after carefully reviewing the testimony reaches the following conclusion, which is clearly substantiated by the proof:

"I am of the opinion that both the Thompson and the Snow were proceeding at an excessive rate of speed in view of the pending conditions. It is quite clear from the testimony that very little deviation would have avoided the collision."

The judge concludes his résumé of the testimony by the following statement:

"The real question in the case is whether because of her excessive speed the Snow is to be condemned for contributing to the collision."

That she was going at excessive speed is thus conceded, as it necessarily must be, in view of the proof that she was making at least 5 knots an hour and that all sails were set and drawing. Some of the witnesses testified that she was making seven or eight knots an hour but all agree that she was going as fast as it was possible for her to go with the weather conditions then prevailing. We do not attempt an extended analysis of the testimony for the reason that the crucial question is one of law arising upon undisputed facts. Briefly stated, the facts are these—A schooner collides with a steamer in a dense fog.

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The schooner is going as fast as it is possible for her to go. The International Rules of Navigation provide, article 16, as follows:

"Every vessel shall, in a fog, mist, falling snow, or heavy rain-storms, go at moderate speed, having careful regard for the existing circumstances and conditions."

It is, of course, difficult to define moderate speed in all circumstances but it is safe, we think, to define it as something less than top speed or full speed. A vessel that is proceeding as fast as her machinery or her sails will carry her is not going at moderate speed.

In The Pennsylvania, 86 U. S. (19 Wall.) 125, at page 136, 22 L. Ed. 148, Mr. Justice Strong says:

"But when as in this case, a ship at the time of a collision is in actual violation of a statutory rule, intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the mandate of the statute."

In The Bolivia, 49 Fed. 169, at page 171, 1 C. C. A. 221, at page 223, this court said:

"We cannot agree with the opinion of the learned district judge that the fault of the steamship was not contributory to the collision. The burden is upon her to show that it was not and from the nature of the case this cannot be done. If she had been going slower, she would not have reached the place of the collision when the schooner was there."

See, also, The Rhode Island (D. C.) 17 Fed. 554.

We are of the opinion that after having found that the Snow was proceeding in violation of the statute requiring her to proceed at moderate speed the District Court could not find that this negligence did not contribute to the disaster. On the contrary, we are of the opinion that had the rule been followed it is more than probable that the collision would not have happened.

The decree is modified and both vessels are held at fault with the costs of this appeal to the appellant.

(244 Fed. 672)

SANBORN-CUTTING CO. v. PAINE.

(Circuit Court of Appeals, Ninth Circuit. August 20, 1917.)

No. 2898.

1. BANKRUPTCY ⟹245—TRUSTEE'S SUIT FOR CREDITORS.

A corporation having been adjudged a bankrupt under Bankr. Act July 1, 1898, c. 541, 30 Stat. 544, as amended by Act June 25, 1910, c. 412, 36 Stat. 838, the trustee could act for all the creditors in asserting their rights to liens on property coming into his custody by legal or equitable proceedings.

2. BANKRUPTCY ⟹303(3)—ACTION BY TRUSTEE—SUFFICIENCY OF EVIDENCE.

In suit by a trading company's trustee in bankruptcy for an accounting and restitution of assets, etc., evidence *held* to show that, when the president of a packing company assigned to the officer of defendant company

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shares of stock in the packing company and a debt owing the trading company by the packing company for merchandise, the trading company was insolvent, and that the assignor and assignees had ample reason so to believe.

3. CORPORATIONS ⟹542(1)—FRAUDULENT CONVEYANCES—QUESTION INVOLVED.
Where creditors of an insolvent corporation or those representing creditors assail transfers and agreements as prejudicial to their rights, the question is not whether the various transfers and agreements are to be upheld merely as between the parties to them, but whether the law will avail complaining creditors of the insolvent corporation to obtain possession of the property transferred as subject to corporate debts.

4. CORPORATIONS ⟹182—POWER OF MAJORITY STOCKHOLDER—CONVEYING PROPERTY.
The president of a corporation who owned all but two of its 25,000 shares of stock could not wholly ignore the fact that there was a corporate existence not to be disregarded at his will, as an individual stockholder, by independent attempt to convey the property of the corporation.

5. CORPORATIONS ⟹542(1)—CONVEYANCE BY CORPORATION—FRAUD.
Where an insolvent packing company transferred all of its property to another company, the only consideration moving to the packing company being payment by the transferee company of part of the packing company's debts, nearly all of which were due two individuals who at the same time were stockholders and directors in the packing company and also in the transferee company, the transfer from the packing company being made with the knowledge and intention on the part of the directors that the packing company should cease business after the transfer, such transfer cannot operate to defeat the claims of the packing company's creditors.

6. CORPORATIONS ⟹182—ACT OF MAJORITY STOCKHOLDER—WAIVER.
A trading company did not waive its claim upon the assets of a packing company, debtor to it, through the acts of the majority stockholder in the trading company; as he was not the corporation, and could not use its assets for his own benefit or deprive its creditors of their claims upon the assets.

7. BANKRUPTCY ⟹185—ESTOPPEL OF TRUSTEE—ACT OF MAJORITY STOCKHOLDER—BINDING FORCE.
The trustee in bankruptcy of a trading company was not estopped from pursuing a claim for restitution of assets against the assignee of a packing company, the trading company's debtor, on the theory that the trading company and its creditors became bound by any agreement between the majority stockholder in the trading company and the assignee company that the trading company would not enforce its claim against the packing company's assets; the trading company, and not its majority stockholder, having been the creditor.

8. BANKRUPTCY ⟹306—APPEAL—LAW OF CASE.
Where a trustee in bankruptcy took no appeal from a decree of the District Court, the Circuit Court of Appeals may not consider a point made in his brief that the District Court erred in not making an allowance.

Appeal from the District Court of the United States for the District of Oregon; Robert S. Bean, Judge.

Suits in equity by V. A. Paine, as trustee of the Kake Trading & Packing Company, a corporation, against the Sanborn-Cutting Company, a corporation, and others. From a decree for plaintiff, as trustee, against the Sanborn-Cutting Company, the latter appeals. Affirmed.

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G. C. & A. C. Fulton, of Astoria, Or., for appellant.

Gunnison & Robertson, of Juneau, Alaska, and James J. Crossley, of Portland, Or., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. In December, 1915, the appellee, Paine, as trustee of the Kake Trading & Packing Company (to be called Trading Company), a corporation voluntarily adjudged a bankrupt on April 9, 1915, brought suit in the United States Court in Oregon against Kendall, Gordon, Sanborn, Kake Packing Company, and Sanborn-Cutting Company for an accounting by the Sanborn-Cutting Company of its conduct of the business of the Kake Packing Company, a corporation (to be called the Packing Company), since May, 1914, for restitution of the assets of the Packing Company, and for an account of 125 shares of stock of the Packing Company belonging to the Trading Company, and for judgment against Kendall, Gordon, and Sanborn-Cutting Company and each of them for $12,500, and for other relief. On the same day Paine, as trustee, brought suit in Alaska against the Kake Packing Company and appellant herein, Sanborn-Cutting Company. In the Alaska case the trustee prayed that the conveyance of the assets be held void, and that the Cutting Company account and make restitution to the Packing Company, or that, if restitution could not be had, the property be held by the Cutting Company subject to the debts of the Packing Company to be disposed of to pay the unpaid debts of the Packing Company, including a judgment theretofore recovered by the trustee against the Packing Company, or that the Cutting Company be required to pay the unpaid debts of the Packing Company, including the judgment recovered by the trustee and for judgment against the Cutting Company for $10,823.14, with interest, and for further relief. By stipulation the Alaska and Oregon suits were consolidated and tried on the merits before the United States District Court in Oregon. Decree was awarded Paine, as trustee, and against this appellant, Sanborn-Cutting Company, for $6,687.87, with interest, without costs to either party. Order of dismissal was made as to Sanborn, Kendall, and Gordon. Sanborn-Cutting Company appeals.

The Oregon suit is brought by the trustee of the Trading Company, bankrupt, for and on behalf of the trustee and all stockholders of the Packing Company similarly situated who may wish to join and for the benefit of the Packing Company. The substance of the complaint is that the Trading Company on April 9, 1915, doing business in Alaska, was not able to pay the just claims of its creditors; that the Kake Packing Company and the Sanborn-Cutting Company were Oregon corporations doing business in Alaska; that one Ernest Kirberger was president, manager, and trustee of the Trading Company, bankrupt, and owner of the majority of stock thereof; that the corporation owned property valuable for use in the salmon industry, and about February, 1912, together with Sanborn and Gordon, Kirberger organized the Kake Packing Company to pack fish and food products in Oregon and Alaska; that the Packing Company had a capital stock

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of $50,000 divided into 500 shares of $100 par value each, Kendall and Sanborn each having 85 shares, Gordon 60 shares, Frank Sanborn, son of G. W. Sanborn, 10 shares, G. C. Fulton and G. W. Sanborn, 20 shares, and A. C. Kirberger, brother of Ernest, heretofore mentioned, 60 shares; that when the Packing Company was organized, Sanborn, Gordon, and Kendall knew of the fact that when the Packing Company was organized it was agreed between Gordon, Sanborn, and Kendall and Ernest Kirberger that Kirberger would buy 85 shares of stock therein by causing the Trading Company to sell and convey to the Packing Company all its property; that thereafter the Trading Company conveyed its property to the Packing Company, and the Packing Company paid to the Trading Company $8,500, which sum the Trading Company, through Kirberger, then immediately paid back to the Packing Company in consideration of 85 shares of stock in the Packing Company. The trustee contends that these 85 shares were purchased with the assets of the Trading Company and became the property of the Trading Company, bankrupt, and were delivered to Kirberger in trust for the Trading Company.

It is also alleged that thereafter the Packing Company owed the Trading Company $4,000 arising out of transactions between the two corporations, but that in furtherance of the scheme agreed upon between Sanborn, Gordon, and Kendall and Kirberger the Packing Company paid the $4,000 to Kirberger, who in turn at once paid the money back to the Packing Company and received 40 additional shares of stock in the Packing Company.

The trustee alleges that this transaction was made without any authority on Kirberger's part; that the 40 shares became the property of the Trading Company and rightfully belonged to the trustee.

It is charged that about January, 1914, Kendall and Sanborn, with a view to defraud the Trading Company and its creditors of 125 shares of stock in the Packing Company and to defraud the creditors of the Trading Company, conspired to obtain 125 shares of stock from Ernest Kirberger, in whose name the stock then stood, and that they induced Kirberger to transfer to Kendall and Sanborn the 125 shares in the Packing Company owned by the Trading Company for $1, a grossly inadequate consideration; that Sanborn, Kendall and Kirberger then well knew that such assignment would unlawfully defraud the Trading Company and its creditors and delay them in collecting their demands, the Trading Company then being known to be insolvent. It is charged that to carry out the scheme Sanborn and Kendall caused a meeting of the stockholders of the Packing Company to be held about May 11, 1914; that Sanborn and Gordon constituted a majority of the directors of the Packing Company, and in connection with Kendall and Frank Sanborn and Fulton, in violation of the rights of the minority stockholders and of the Trading Company, and in connection with Kendall, caused all the assets of the Packing Company to be sold and conveyed to the Sanborn-Cutting Company, appellant herein; that Sanborn and Kendall constituted a majority of the board of directors of the Sanborn-Cutting Company purchasing company; that the sale operated as a fraud against the Trading Company; that Kirberger

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had no authority to assent to the sale; and that Kendall and Sanborn had no right to vote 125 shares referred to in the Trading Company in behalf of the corporation. It is alleged that Sanborn and Kendall held on to the 125 shares in the Packing Company stock, and that the Packing Company was obliged to discontinue business in Alaska, and the Sanborn-Cutting Company unlawfully now holds the property of the Packing Company, and has made profits without accounting therefor to the Trading Company or to the Packing Company; that the Packing Company while under the influences of Sanborn and Kendall will not proceed to have the conveyance and sale set aside; and that a demand on Kendall and Sanborn, as directors of the Packing Company, would be useless.

Sanborn-Cutting Company denied all allegations of fraud, admitted the transfer to it of the assets of the Packing Company, but said that the transfer was for a valuable consideration; that the sale was made at the request of Kirberger, who voted the stock in his name; and that, after the assignment of the assets to the Sanborn-Cutting Company in May, 1914, the latter company took possession of the property, and has no ownership in 125 shares of the Packing Company. By replication the trustee denied all affirmative allegations, and pleaded that the assignment was invalid and wrongful. In the Alaska suit the trustee sued for himself as trustee and other creditors of the Packing Company similarly situated. He pleaded that in August, 1915, in Alaska, as trustee, he recovered judgment against the Packing Company for $10,333.31, with interest; that execution upon the judgment was returned unsatisfied; that about May 12, 1914, the Packing Company, then controlled by the Sanborn-Cutting Company, with intent to defraud the creditors of the Packing Company, and particularly the Trading Company, by bill of sale conveyed all its assets in Alaska to the Sanborn-Cutting Company; that such transfer was not in good faith, but made with notice and in pursuit of a conspiracy to defraud the Trading Company out of its debt against the Packing Company; that the Packing Company was controlled by the Sanborn-Cutting Company, and that the property conveyed should be held subject to the payment of the debts of the Packing Company; that there are many unpaid creditors of the Trading Company, bankrupt; and that they have been delayed and hindered in the collection of their debts by reason of the transfer. The Sanborn-Cutting Company denied all fraud and pleaded purchase in good faith, and that the consideration for the purchase was that it should pay the debts of the Packing Company, excepting a claim of the Trading Company amounting to $8,582.21, and that such an arrangement was agreed to by the Trading Company, which corporation had assigned its claim to Sanborn and Kendall; that the property transferred to the Sanborn-Cutting Company was not worth more than $60,000, but that the latter company agreed to take the property and pay all the debts which were represented at the time to be $76,621.01, exclusive of the claim of the Trading Company; and that the Trading Company induced the Sanborn-Cutting Company to take all the assets of the Packing Company, the main inducement being cancellation of the claim of the Trading

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Company against the Packing Company or the assignment thereof to Sanborn and Cutting, who agreed to satisfy the claim, and subsequently did. It is set up that possession was taken; that the judgment obtained in Alaska was fraudulent and void, in that it was based on the claim of the Trading Company which had theretofore been assigned to Sanborn and Kendall, and hence did not pass by the proceedings in bankruptcy; that Kirberger was the owner of all of the stock of the Trading Company, and had full power and authority to transfer the account referred to.

[1] We can at once dispose of the contention that the trustee is not able to maintain this suit by saying that, the corporation having been adjudged a bankrupt under the Bankruptcy Act of 1898, amended June 25, 1910, the trustee could act for all the creditors in asserting their rights to liens upon property coming into his custody by legal or equitable proceedings. Such is the rule of Pacific State Bank v. Coats, 205 Fed. 618, 123 C. C. A. 634, Ann. Cas. 1913E, 846, followed in Cooper Grocery Co. v. Park, 218 Fed. 42, 134 C. C. A. 64, and In re Lane Lumber Co., 217 Fed. 550, 133 C. C. A. 402. It is also very clear from the record of the appraisement of the Trading Company and the claims filed that in March, 1916, the assets on hand were insufficient to pay the claims.

In the quite voluminous record these matters are specially important. At the time of the transactions under investigation Ernest Kirberger owned 24,998 shares out of 25,000 shares of the Trading Company, and was president, manager and trustee thereof. When the Packing Company was organized by Kendall, Sanborn, and Kirberger on February 19, 1912, with a capital of $50,000 divided into 500 shares of the par value of $100 each, Sanborn and Kendall each subscribed for 85 shares, F. H. Sanborn, son of G. W. Sanborn, subscribed for 10 shares, and Ernest Kirberger for 125 shares, and A. C. Kirberger for 60 shares. Kirberger was president and manager. E. Kirberger testified that property which the Trading Company by resolution of February 29, 1912, authorized him by bill of sale to convey to the Packing Company to the amount of $7,500 represented purchase of 85 shares in the Packing Company, and that he intended to buy 40 shares for himself and to pay for them in cash, but he explained that the total 125 shares standing in the name of Ernest Kirberger were all paid for with the assets of the Trading Company, and the lower court so found. The property transferred was personalty and realty. No authority was given by the Trading Company to Kirberger to purchase the additional 40 shares for which he subscribed. Kirberger expected to get some money from his sister and to pay for these 40 shares in that way, but this plan was not carried out. He testified that the Packing Company owed the Trading Company $4,000 for merchandise, and to pay this $4,000 the Packing Company sent its check, and he (Kirberger) in turn indorsed the check back to the Packing Company in payment of the 40 shares just referred to. Gordon and Sanborn knew that this account of the Trading Company was used by Kirberger to buy the 40 shares of stock, and Kirberger testifies that in 1912 and 1913 he operated under direct instructions of Kendall and Sanborn.

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[2] In the Sanborn-Cutting Company in 1914 Kendall and Sanborn were the sole owners, Sanborn being president and general manager, and the two being really the representatives of the corporation. It was in January, 1914, that Kirberger made two assignments to Kendall and Sanborn, one covering 125 shares of stock in the Packing Company, that being the same stock which had been purchased with the assets of the Trading Company; the other being a debt owing to the Trading Company by the Packing Company for merchandise amounting to $8,582.21. We think it clear from the evidence that when these two assignments were made the Trading Company was insolvent, and that the Trading Company and Ernest Kirberger and Kendall and Sanborn had ample reason to believe that the Trading Company was an insolvent corporation. It had been sued by a creditor, and its operations had not been successful. There was no consideration for the assignment of the stock in the Packing Company or for the debt owing to the Trading Company by the Packing Company for merchandise, except $2, $1 for each assignment. It appears, however, that on January 6, 1914, when Kirberger, in consideration of $1, transferred to Kendall and Sanborn all his interest to the 125 shares of the stock of the Packing Company then standing in his name on the books of the corporation, he also agreed to deliver to Kendall and Sanborn within 30 days from the date of such agreement 60 shares of stock in the corporation standing in the name of A. C. Kirberger, his brother, all subject to certain conditions, namely, that the transfer was to secure cash advances made in 1912 and 1913 by Kendall and Sanborn on account of the Kirbergers in matters connected with the conduct of the Packing Company. This agreement referred to also provided that, as Ernest and A. C. Kirberger desired to reimburse Kendall and Sanborn and to purchase and secure additional stock in the Packing Company, the two Kirbergers were to pay Kendall and Sanborn on or before February 15, 1914, $65,000 in cash or securities, and upon such payment Kendall and Sanborn were to transfer to Ernest Kirberger the 125 shares in the name of Ernest Kirberger and 60 shares in the name of A. C. Kirberger, and also 125 shares in the Packing Company then standing in the name of Kendall and Sanborn, but that in the event of default by the Kirbergers all the right of their stock in the Kake Packing Company should cease and become the property of Kendall and Sanborn. Neither this assignment nor the assignment of the account of the Trading Company against the Packing Company was ever authorized or ratified by the Trading Company corporation, and at a stockholders' meeting and a subsequent meeting of the board of directors held on March 17, 1915, both transfers were formally disapproved.

On May 11, 1914, after some preliminary talks the Kake Packing Company stockholders had a meeting to consider the transfer of all its property to the Sanborn-Cutting Company, and the Packing Company made a bill of sale of its entire assets to the Sanborn-Cutting Company for a recited consideration of $72,621.01. No money changed hands in this transaction, the transfer being represented by book entries. The resolution of sale named the sum of $72,621.01 liabilities

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of the Packing Company, the Sanborn-Cutting Company agreeing to assume and pay all of such liabilities, and it appears that the Packing Company between the time of the sale, May 11, 1914, and the fall of 1914, during which time it earned profits, did largely from profits and earnings pay off a large part of the liabilities of the Packing Company. The Packing Company ceased doing business after the transaction with the Sanborn-Cutting Company, and in doing so followed previously made plans. But there was still the outstanding claim of $8,585.21 owing by the Packing Company to the Trading Company. The record discloses that nearly the whole of the liabilities assumed by the Sanborn-Cutting Company were either personal claims of Kendall, Sanborn, Sanborn & Son, or the Sanborn-Cutting Company, or were liabilities which had been secured or indorsed by them or some of them. It also appears that upon May 11, 1914, Kirberger and the Trading Company and the Packing Company made a deed to the Sanborn-Cutting Company for a consideration of $10 for a tract of land near Kake, Alaska.

[3, 4] We accept the finding of the District Court that the transactions had between the corporations and persons above mentioned were all without actual or willful intent to perpetrate any wrong. Here, as in many other instances where creditors or those representing creditors assail such transactions as prejudicial to their rights, the question is not whether the various transfers and agreements are to be upheld merely as between those who are the parties to them, but whether the law will avail complaining creditors of the insolvent corporation to obtain possession of the property transferred as properly subject to the payment of corporate debts. The assignments of January 6, 1914, made by Kirberger were not the acts of the Trading Company. The corporation received no consideration for either of them; no corporate act was ever had which authorized Kirberger to make them, and no ratification or acquiescence of or in them was made by the Trading Company as a corporation. Kendall and Sanborn well knew that there was no corporate authorization in Kirberger to make them. They knew that Kirberger owned all but two shares of the Trading Company stock, and though they dealt with him as the sole acting representative of the company, and though they believed that anything he might do in the name of the corporation with respect to its affairs would be of binding force, still as against creditors of the corporation Kirberger could not wholly ignore the fact that there was a corporate existence not to be disregarded at the will of himself, an individual stockholder, by independent attempt to convey the property of the corporation.

In Cook on Corporations the author cites many cases sustaining his text to the effect that a single stockholder cannot make a contract for and in the name of the corporation which shall have any binding force or validity except by subsequent ratification or adoption by the corporation in the regular manner, and, further, that although one person owns a majority of the stock or all of it, or all but two shares, he does not in consequence thereof acquire the right to act for the corporation or as the corporation independently of the directors. Cook on Cor-

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porations (6th Ed.) pp. 2225, 2226. In Mays, Assignee, v. Foster et al., 13 Or. 214, 10 Pac. 17, it was held that, except under particular circumstances, the fact that a stockholder in a company transfers his stock to an individual cannot be construed as a transfer for the benefit of the company; it is simply an individual act between the parties, and although the company may have knowledge respecting it, such a transfer neither creates nor discharges any liability. In re Haas Co., 131 Fed. 232, 65 C. C. A. 218.

[5] Turning now to the transfer by the Packing Company of all of its property to the Sanborn-Cutting Company, appellant herein, we find that the only consideration moving to the Packing Company was payment by the Sanborn-Cutting Company of a part of the debts of the Packing Company. We must keep in mind that nearly all of these debts were due to Sanborn and to Kendall as individuals, or were for debts for which Sanborn and Kendall had become liable as indorsers. Thus the effect was that Sanborn and Kendall, being at the time stockholders and directors in the Packing Company, insolvent, selling corporation, and in the Sanborn-Cutting Company, buying corporation, attempted to gain preferences in favor of themselves over other creditors of the Packing Company and to the prejudice of such other creditors. Under such a situation the transfer from the insolvent selling corporation, being made with the knowledge and intention on the part of the directors that it shall cease business after the transfer has been made, cannot operate to defeat the claims of corporation creditors. In Sutton Manufacturing Co. v. Hutchinson, 63 Fed. 496, 11 C. C. A. 320, Justice Harlan sitting with the Court of Appeals of the Seventh Circuit drew a distinction between the powers of solvent and insolvent corporations with respect to the disposition and transfer of their estates. He said for the court:

"It is quite true that the property of a private corporation is not charged by law with any direct trust or specific lien in favor of general creditors; and such a corporation, so long as it is in the active exercise of its functions, may, if not restrained by its charter or by statute, exercise as full dominion and control over its property, having due regard to the objects of its creation, as an individual may exercise over his property. But when it becomes insolvent, and has no purpose of continuing business, the power to sell, dispose of, and transfer its estate is not altogether without limitation. * * * It is, we think, the result of the cases that when a private corporation is dissolved or becomes insolvent, and determines to discontinue the prosecution of business, its property is thereafter affected by an equitable lien or trust for the benefit of creditors. The duty in such cases of preserving it for creditors rests upon the directors or officers to whom has been committed the authority to control and manage its affairs. Although such directors and officers are not technical trustees, they hold, in respect of the property under their control, a fiduciary relation to creditors; and necessarily, in the disposition of the property of an insolvent corporation, all creditors are equal in right unless preference or priority has been legally given by statute or by the act of the corporation to particular creditors. * * * In our judgment, when a corporation becomes insolvent and intends not to prosecute its business, or does not expect to make further effort to accomplish the objects of its creation, its managing officers or directors come under a duty to distribute its property or its proceeds ratably among all creditors, having regard, of course, to valid liens or charges previously placed upon it. Their duty is 'to act up to the end or design' for which the corporation was created (1 Bl.

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Comm. 480) and when they can no longer do so their function is to hold or distribute the property in their hands for the equal benefit of those entitled to it. Because of the existence of this duty in respect to a common fund in their hands to be administered, the law will not permit them, although creditors to obtain any peculiar advantage for themselves to the prejudice of other creditors. This rule is imperatively demanded by the principle that one who has the possession and control of property for the benefit of others—and surely an insolvent corporation, which has ceased to do business, holds its property for the benefit of creditors—may not dispose of it for his own special advantage to the injury of any of those for whom it is held."

This opinion of Justice Harlan is referred to and the case distinguished on its facts in Sanford Tool Co. v. Howe, Brown & Co., 157 U. S. 312, 15 Sup. Ct. 621, 39 L. Ed. 713. See, also, Jones on Insolvent and Failing Corporations, pp. 103, 104, 205; Williams v. Commercial National Bank, 49 Or. 498, 90 Pac. 1012, 91 Pac. 443, 11 L. R. A. (N. S.) 857; Marshall on Private Corporations, pp. 1054, 1055; Montgomery v. Phillips, 53 N. J. Eq. 203, 31 Atl. 622; Corey v. Wadsworth, 99 Ala. 68, 11 South. 350, 23 L. R. A. 618, 42 Am. St. Rep. 29; Idaho-Oregon Light & Power Co. v. Bank of Chicago, 224 Fed. 39–45, 139 C. C. A. 503.

[6] We cannot accept the view that the Trading Company waived its claim upon the assets of the Packing Company by and through the acts of Kirberger, majority stockholder in the Trading Company. As already said, Kirberger was not the corporation, and could not use the assets of the Trading Company for his own benefit, and could not deprive the creditors of the Trading Company of their claims upon the assets of the corporation.

[7] Nor can we believe that the trustee in bankruptcy is estopped from pursuing the claim involved against the Sanborn-Cutting Company upon the theory that the Trading Company and its creditors became bound by any agreement between Kirberger and the Sanborn-Cutting Company to the effect that the Trading Company would not enforce its claim against the assets of the Packing Company. This seems very clear when we keep in mind the fact that the Trading Company was the creditor, and not Kirberger, and that under such circumstances Kirberger had no authority to bind the Trading Company and its creditors.

The District Court awarded judgment to the trustees against the Sanborn-Cutting Company for $6,688.87, that sum being 66⅔ per cent. of $10,333.31, the amount of the debt of the Trading Company, with interest thereon at 6 per cent. per annum from May 12, 1914.

[8] The trustee suggests that he is entitled to a modification of the decree so that he shall recover $10,333.31, which is the amount recovered in the judgment in the courts of Alaska against the Packing Company, made up of the accounts of bills receivable, $8,582.21, plus $1,750 due by appellant for certain real estate used as a canning site. The land was conveyed by deed May 11, 1914, by the Trading Company to the Packing Company and by the Trading Company with Kirberger and the Packing Company to the Sanborn-Cutting Company for a named consideration of $10. But, as the trustee took no appeal from the decree of the District Court, we may not consider the point made

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in his brief that the court erred in not making the allowance referred to. Clark v. Killian, 103 U. S. 766, 26 L. Ed. 607; United States v. Blackfeather, 155 U. S. 180, 15 Sup. Ct. 64, 39 L. Ed. 114; Guarantee Co. v. Phenix Insurance Co., 124 Fed. 170, 59 C. C. A. 376.

These views dispose of the principal points in the case. The District Court found from the evidence that the value of the property transferred was about $60,000, that the liabilities, including that to the Trading Company, amounted to $90,000, and that, if the property had been applied to the payment of the debts of the Packing Company, 66⅔ per cent. would have been paid. This finding we approve.

Our conclusions are that the District Court was right in its decree that the assignment by Ernest Kirberger to Kendall and Sanborn of the account of $8,582.21 due the Trading Company from the Packing Company was null and void, and that the appellant corporation received the property transferred to it by the Packing Company subject to the indebtedness amounting to $10,333.31 owing by the Packing Company to the Trading Company, and received the assets and property as the trustee for the benefit of the creditors of the Packing Company, and that the trustee succeeded to the rights of the Trading Company as a creditor of the Packing Company, and we affirm the decree that the trustee recover from the Sanborn-Cutting Company $6,688.87, together with interest from May 12, 1914, and also costs.

In allowing interest on the sum awarded from May 12, 1914, the court correctly regarded the $6,688.87 as money due upon the settlement of a matured account. Sargent v. American Bank & Trust Co., 80 Or. 38, 154 Pac. 759, 156 Pac. 431.

Affirmed.

(244 Fed. 682)

QUIRK v. BANK OF COMMERCE & TRUST CO.

(Circuit Court of Appeals, Sixth Circuit. June 30, 1917.)

No. 2932.

1. CONTRACTS ⟹111—RESTRAINT OF MARRIAGE—CONSTRUCTION.

A promise to remain single, whether during the promisee's or promisor's lifetime, will not be lightly implied, for even such partial restraint of marriage is generally deemed contrary to public policy, if not illegal.

2. WILLS ⟹58(1)—CONTRACTS TO DEVISE—RESTRAINT OF MARRIAGE.

Plaintiff, when a girl of 16, while attending school, met deceased, a man of nearly 50, and he shortly asked permission of her parents to pay her court with a view to marriage. On account of her immaturity and the disparity of ages, plaintiff's parents did not look with favor on the proposed marriage, but deceased remained devoted to her and upon the most intimate relations with her family. Five years thereafter plaintiff and deceased became engaged, but in deference to her mother's wishes plaintiff refused to then marry deceased. In accordance with deceased's request, plaintiff promised him that so long as he should live she would remain devoted to him, the same as she had been, and in return for and in consideration of the love and affection, service, and loyalty of plaintiff and her family, deceased promised to bequeath and devise to plaintiff the bulk of his fortune. The parties remained engaged, but the marriage was never consummated, although plaintiff and her family cared for de-

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ceased in his declining years, when he was afflicted with an incurable disease. *Held*, that the agreement was not one even in partial restraint of marriage, for marriage to another would not have absolutely prevented plaintiff from performance of the obligations assumed by her toward deceased, who did not live in the same place, but merely visited her and her family in the summer, and hence the contract was not subject to attack on the ground that it was illegal, being in restraint of marriage.

3. FRAUDS, STATUTE OF ⟹50(1)—CONTRACTS TO BE COMPLETED WITHIN YEAR.
A contract is not invalid, under the statute of frauds, because the contingency on which it is based may not happen within one year, it being possible for it to happen within that time.

4. FRAUDS, STATUTE OF ⟹75—CONTRACTS TO DEVISE REALTY.
An oral contract to devise real estate is within the statute of frauds.

5. FRAUDS, STATUTE OF ⟹130(2)—CONTRACTS—INVALIDITY.
An oral contract to devise and bequeath property which is indivisible is, under the statute of frauds, entirely unenforceable if it includes an agreement to devise real estate.

6. FRAUDS, STATUTE OF ⟹130(2)—CONTRACTS—VALIDITY.
A testator entered into an oral agreement to devise and bequeath the bulk of his estate to plaintiff. About one-half of the estate consisted of realty. *Held* that, under the statute of frauds, the contract was unenforceable, for the testator had the option of giving plaintiff either realty or personalty, and to allow plaintiff to enforce the contract by recovering the personalty would, in effect, compel compliance with that portion of the contract unenforceable because relating to realty.

7. FRAUDS, STATUTE OF ⟹129(1)—PART PERFORMANCE.
The doctrine of part performance, which will take a case out of the statute of frauds, is applicable only to equity.

8. FRAUDS, STATUTE OF ⟹129(1)—PART PERFORMANCE—APPLICATION OF DOCTRINE.
In an action at law on an oral contract entered into in Wisconsin to devise and bequeath land and personalty, instituted in the federal district court for Tennessee, the doctrine of part performance need not be considered, being applicable only to equitable relief, and not being applicable to the contract under the Tennessee or Wisconsin laws.

9. FRAUDS, STATUTE OF ⟹138(4)—ACTIONS—PLEADING—SUFFICIENCY.
One who has given a consideration, and cannot enforce the promise solely because of the statute of frauds, and not because of some inherent illegality in the contract itself, may maintain a quasi contractual action.

10. COURTS ⟹333—FEDERAL COURTS—STATE PRACTICE.
The federal courts follow the state practice.

11. WILLS ⟹68—CONTRACTS TO DEVISE—ACTION—DECLARATION.
Shannon's Code Tenn. § 4437, abolishes technical forms of action, and allows all contracts to be sued on in the same form of action, while section 4438 declares that all wrongs and injuries to property and person may be redressed by an action on the facts of the case, and section 4439 allows counts in tort and contract to be joined. Plaintiff's declaration alleged that she and deceased entered into an oral contract whereby he was to devise and bequeath to her the bulk of his estate, consisting of land and personalty, and that she fully complied with the contract, but that deceased breached the same. *Held* that, though the declaration relied on the contract, nevertheless it stated a good cause of action on the quasi contract arising out of plaintiff's performance and defendant's breach, the contract being unenforceable under the statute of frauds.

12. PLEADING ⟹193(6), 352—ATTACK—MODE OF ATTACK.
Under the Tennessee practice, the error whereby two causes of action are joined in a single count can be taken advantage of only by a motion to strike and not by demurrer.

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13. WILLS ⟹68—CONTRACTS TO DEVISE—ACTIONS—RUNNING OF STATUTE OF LIMITATIONS—QUANTUM MERUIT.

Where deceased breached his oral agreement to devise and bequeath the bulk of his estate, consisting of land and personalty, to plaintiff, plaintiff's right of action on the quantum meruit for services rendered in reliance upon deceased's agreement accrues at the death of deceased, and limitations do not begin to run until that time.

14. EXECUTORS AND ADMINISTRATORS ⟹206(4)—CLAIM FOR SERVICES—QUANTUM MERUIT—MEASURE OF DAMAGES.

Where deceased agreed, in consideration of plaintiff's love, affection, service, and loyalty, to devise and bequeath to her the bulk of his estate, and such agreement was unenforceable because of the statute of frauds, plaintiff's recovery on the quantum meruit is limited to the value of her services, and where, as here, the extent of the services to be rendered is entirely uncertain and dependent upon the length of the promisor's life, evidence as to the value of the bulk of the estate is inadmissible to show the value the parties put on such services, although deceased's financial condition and mode of life should be considered in determining the value of such services.

In Error to the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

Action by Mollie Quirk against the Bank of Commerce & Trust Company, executor of the estate of Patrick Kallaher, deceased. There was a judgment for defendant on demurrer to the declaration, and plaintiff brings error. Reversed and remanded, with directions.

G. T. Fitzhugh, of Memphis, Tenn., and Robert N. McMynn, of Milwaukee, Wis., for plaintiff in error.

J. W. Canada, of Memphis, Tenn., for defendant in error.

Before WARRINGTON, MACK, and DENISON, Circuit Judges.

MACK, Circuit Judge. The trial court sustained a demurrer to the declaration after refusing leave to plaintiff to amend a second time. The question presented on this writ of error is therefore whether the declaration states a good cause of action.

In substance, plaintiff, a citizen of Wisconsin, charges that Patrick Kallaher failed to fulfill his oral promise to devise to her the bulk of his fortune. The relation of the parties, the promise, and the consideration are set out at length in the allegations, which may be summarized as follows:

In the summer of 1888, Capt. Kallaher met Mollie at Waukesha, Wis., where he was spending the summer. At that time she was a girl of 16, living with her parents at Milwaukee, and attending school at St. Mary's Convent. He was then a man of nearly 50. He called upon her frequently that summer at her home, and they soon became very close and devoted friends. Soon thereafter he asked permission of her parents to pay her court with a view to marriage. On account of her immaturity and the disparity of ages, they did not look with favor upon the proposed marriage. He remained, however, none the less devoted to her, and upon the most intimate relations with her people, spending two to four days of each week of the summer season, which he was wont to spend at or about Waukesha, with Mollie and her family at Milwaukee. Upon these visits, which continued throughout a period of 20 years, he was received by the Quirks with great hospitality and

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treated with kindness and affectionate regard, just as if he had been a member of the household.

During this entire period his affections were centered upon Mollie, whom he urged to marry him and whose consent he did obtain in 1893. Their engagement continued, it is alleged, from that time to the death of the testator; but the marriage was postponed on account of the objections of the plaintiff's mother during her life, and out of respect for her wishes thereafter as well as on account of the testator's ill health.

[1, 2] Shortly before the mother's death, and after Mollie had again refused to marry the Captain *at that time,* because her parents would not consent, the Captain asked her to promise him that so long as he should live she would remain devoted to him the same as she had been, and he told her that if she would so promise, that in return for and in consideration of the love and affection, service, and loyalty of herself and her family, given and to be given to him, he would bequeath and devise to her the bulk of his fortune; that thereupon she gave him her promise to that effect; that he thereupon entered into a contract with her that he would leave her the bulk of his fortune after his death in consideration of the life of service and loyalty and affection which had been and was to be devoted to him by her as long as he lived.

She averred that this contract was in no manner abrogated or impaired, but remained in full force and effect down to the date of his death, and that she had fully performed her part of the contract; that down to his death, in addition to the loyalty and affection and service of the plaintiff, he through all the years enjoyed the advantage and comfort of the home of plaintiff's family, which he always said was the only real home that he had ever had; that during his various visits and sojourns in the home of plaintiff's family, she and other members of her family waited upon him and rendered him such services of affection as would be given by daughters to members of their own household, and in later years such services became more and more difficult and unpleasant to perform; that for several years prior to his death he was afflicted with an incurable disease; that during all such time she and her sister waited on him, and affectionately and faithfully performed nursing services, regardless of the unpleasant nature thereof. Other services and acts of kindness, affection, and loyalty upon the part of Mollie and her family toward the comfort and well-being of the testator followed in full accord with the terms and spirit of their agreement. He was not only received most hospitably at the Quirk residence, but at his request Mollie remained with him at the hospital at Baltimore, and stayed with and comforted him during his last illness at Memphis, and at her home in Milwaukee, where he asked to be brought. He gave her $25,000 in bonds in June, 1910, and another $15,000 in June, 1912, telling her that this was only a gift at the time and not all that she was to get.

Defendant contends most strenuously that this agreement was one in restraint of marriage; that as such it was void and against public policy; and that therefore no action lies either for its breach or in quantum meruit for the consideration given by plaintiff.

It will be observed, however, that plaintiff specifically charges that the engagement to marry continued unbroken until the Captain's death,

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and that the contract in question was made after she had refused to marry him at a specific time—a time when parental consent could not be obtained. It is not alleged that Kallaher either requested her or that Mollie promised not to marry another. The continued engagement implied, of course, a promise not to marry another while the engagement lasted; but this engagement, combined with the declination to marry the Captain at that particular time, cannot convert the promise to be as devoted and loyal to him as she had been into a promise to remain single. Clearly, the promise means either that the engagement shall continue with the implication that marriage will follow at some convenient time, and that the same affection theretofore given shall continue to be given, or it means that, even if her then refusal to marry shall persist, whether because of filial duty or after the parents' death in filial devotion to their wishes, or for any other reason, that she will nevertheless give him devotion and loyalty. A promise to remain single, whether during the promisee's or the promisor's lifetime, will not lightly be implied; for even such partial restraint of marriage is generally deemed contrary to public policy even if not illegal. And inasmuch as marriage to another would not absolutely prevent performance of the obligations thus assumed by her toward a man who did not live in the same place, but merely visited her and her family in the summer, it cannot fairly be deemed to have been contemplated by the parties that she should devote herself exclusively to him. We are unable to find any implied obligation that Mollie should not marry another; such care and devotion as a loving child would render would seem to cover the obligation, fairly construed. The contract, therefore, was not in restraint of marriage, either general or partial.

[3-6] The contract, however, was oral; and it is contended that it is unenforceable because of the statute of frauds. A contract, however, that on a contingency contemplated by the parties may be completed within one year is not subject to the statute because the contingency may not happen within that time. Heath v. Heath, 31 Wis. 223; Chase v. Hinkley, 126 Wis. 75, 79, 105 N. W. 230, 2 L. R. A. (N. S.) 738, 110 Am. St. Rep. 896, 5 Ann. Cas. 328; Deaton v. Tennessee Coal & R. R. Co., 12 Heisk. (Tenn.) 650, 654.

But an oral contract to devise real estate is within the statute, and an indivisible obligation is entirely unenforceable, if the grant of real estate forms a part thereof. In re Sheldon's Estate, 120 Wis. 26, 97 N. W. 524; Goodloe v. Goodloe, 116 Tenn. 252, 92 S. W. 767, 6 L. R. A. (N. S.) 703, 8 Ann. Cas. 112; Horton v. Stegmyer, 175 Fed. 756, 99 C. C. A. 332, 20 Ann. Cas. 1134; Browne, Statute of Frauds, §§ 140–142. We need not consider whether the promisee who has performed his obligation in full may waive performance of so much of the counter obligation as relates to real estate and enforce only that part which relates to personal property; if this were an agreement to devise all of the property, it would be necessary to determine this as between the conflicting authorities. Here, however, the bulk is to be given; not the bulk of realty and the bulk of personalty, but the bulk of the entire estate. Thereunder the testator might have devised only his realty; his was the option. A waiver of the right to the realty and recovery of the personalty alone would not be in accordance with the contract; it would

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involve the substitution by the court of a new contract for the one made by the parties. Moreover, in this case, the declaration alleges that of an estate in excess of $600,000 not less than $250,000 was personalty. The bulk of the property, therefore, not only might include realty, but might consist only of realty. And when the promisor has the option of giving realty or personalty, his promise is wholly unenforceable because the enforcement of one of the alternatives would be but a wedge to secure the enforcement of the other. Howard v. Brower, 37 Ohio St. 402; Wolfskill v. Wells, 154 Mo. App. 302, 134 S. W. 51; Andrews v. Broughton, 78 Mo. App. 179; Patterson v. Cunningham, 12 Me. 506; Mather v. Scoles, 35 Ind. 1; contra, Mercier v. Campbell, 14 Ont. L. R. 639, criticised in 46 Canadian Law Journal, 273, and 26 Law Quarterly Review, 194; and see Browne, Statute of Frauds, § 152.

[7, 8] Inasmuch as the doctrine of part performance relates only to relief in equity (Browne, Statute of Frauds, sec. 451), and moreover does not prevail in Tennessee (Goodloe v. Goodloe, supra; Patton v. McClure, Mart. & Y. 333), and is inapplicable to the contract in question under Wisconsin law (Rodman v. Rodman, 112 Wis. 378, 88 N. W. 218), we need not consider its limitations.

[9-12] But one who has given a consideration, and who cannot enforce the promise solely because of the statute of frauds, and not because of some inherent illegality in the contract itself, is no longer remediless; a quasi contractual action is maintainable. Browne, Statute of Frauds, § 118. Whether a count on the contract and one in quantum meruit may be joined, and whether a single count setting forth the entire transaction and seeking whatever recovery may be possible thereunder is proper, are questions of local procedure; the federal courts follow the state practice. Under the Tennessee Code, technical forms of action are abolished; all contracts may be sued on in the same form of action (section 4437); all wrongs and injuries to property and person may be redressed by an action on the facts of the case (section 4438); and a simple statement of the facts suffices, if these facts entitle a plaintiff to recover in any form (Hall v. Memphis Co. [C. C.] 155 Fed. 57). Counts in tort and contract may be joined. Section 4439. And if a single count for the combined cause of action be formally defective, advantage could be taken thereof only by a motion to strike, not by a demurrer. Waggoner v. White, 11 Heisk. (Tenn.) 741. In this case all the facts necessary to constitute a good cause of action on a quantum meruit are set forth; the plaintiff's conclusion as to the theory on which she is entitled to redress alone is erroneous. While under common-law pleading there can be no recovery in quantum meruit under a count for breach of contract (Jackson v. Stearns, 58 Or. 57, 113 Pac. 30, 37 L. R. A. [N. S.] 639, Ann. Cas. 1913A, 284, and cases cited in note), under the Tennessee Code this declaration on the facts is good against demurrer. See Hall v. Memphis Co., supra; Knoxville Traction Co. v. Lane, 103 Tenn. 376, 53 S. W. 557, 46 L. R. A. 549. See, too, Graham v. Graham, 134 App. Div. 777, 119 N. Y. Supp. 1013.

[13] The statute of limitations begins to run against such a claim for services, based upon a quantum meruit, not as the services are ren-

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dered, but at the death of the promisor, when the obligation matures. Goodloe v. Goodloe, supra; In re Kessler's Estate, 87 Wis. 660, 59 N. W. 129, 41 Am. St. Rep. 74. Moreover, in the present case, the services continued until his death.

[14] Although the evidence as to the oral agreement is admissible to prove that the plaintiff's services were not given gratuitously, without expectation of reward, the promised reward affords no real measure of the plaintiff's quasi contractual recovery either in Tennessee or Wisconsin. Goodloe v. Goodloe, supra; In re Sheldon's Estate, 120 Wis. 26, 97 N. W. 524. The plaintiff's right must be measured by the reasonable value of the consideration given by her to him. If the services to be rendered had been definitely fixed in amount when the contract was made, the testimony as to the value of the bulk of the estate would be admissible to show the value that the parties placed on the services that were to be given; but where, as here, the extent of the services to be rendered is entirely uncertain and dependent upon the length of the promisor's life, such evidence is of no probative force in ascertaining their reasonable value. Woodward, Quasi Contracts, §§ 104–106, with citation of cases pro and con. Captain Kallaher's manner of living and financial condition at the time the services were rendered may, however, be considered in this connection; for the reasonable value placed by the parties on such highly personal services as this plaintiff performed for the Captain would be largely affected by his financial and social position and the circumstances under which they were given.

The judgment must be reversed, and the cause remanded, with directions to overrule the demurrer.

(244 Fed. 688)

UNITED REAL ESTATE & TRUST CO. v. BLOCHMAN et al.

(Circuit Court of Appeals, Ninth Circuit. August 20, 1917.)

No. 2899.

1. MORTGAGES ⟹310—POWER OF TRUSTEE—RELEASE OF LOTS—PART PAYMENT.

The owner of land, on part payment by the purchaser, called the beneficiary, conveyed to a trustee under a trust agreement providing that the property might be subdivided into lots, that the signature of the trustee, with acknowledgment of the map or plat of the subdivision, should bind all parties, that the trustee was authorized to sign and acknowledge as proprietor such map or plat, subdividing the lands, as should be presented to it for signature by the beneficiary, that the land, when subdivided, should have at least 250 lots, and that beneficiary would expend in the subdivision, laying out, platting, and preparation for sale of said real property at least the sum of $25,000, all costs and expenses of subdivision to be borne and paid by the beneficiary. It was further agreed that, when so subdivided, the property might be sold by the beneficiary on payment to the trustee, for the benefit of vendor, of a specified sum for each lot, such sum to be paid by the trustee to the vendor as soon as received, whereupon the trustee was authorized and directed to execute deeds on any lot to the order of the beneficiary. *Held*, that the expenditure of the $25,000 by the beneficiary was not a condition precedent to his right to sell, and to the power of the trustee to release.

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2. MORTGAGES ⟹310—CONSTRUCTION—TRUST DEED.
Where a declaration of trust, pursuant to which an owner of land conveyed the same to a trustee on part payment of the price by the purchaser, is equivocal, the doubt must be resolved in favor of the trustee; the instrument having been prepared by the vendor.

3. MORTGAGES ⟹310—TRUST DEED—RELEASE OF LOT—SALE.
Under a stipulation in a trust deed, whereby the owner on receiving part payment of the price conveyed the land to a trustee, that the vendor "does hereby authorize and direct the said trustee to execute deeds on any lot or lots to the order of the beneficiary herein, or his assigns, whenever there shall have been paid to the said trustee for the account of said [vendor] the sum per lot as hereinbefore stated," an actual sale by the beneficiary was not essential to the trustee's power to release lots; the only requisite being the payment of the sum per lot as stipulated.

4. MORTGAGES ⟹310—POWER OF TRUSTEE—RELEASE OF LOTS—PART PAYMENT.
The further provision of such declaration of trust that, "whenever $1,000 shall be paid to said [vendor] on account of" the balance due on purchase price, "the interest on the amount so paid shall cease, and all payments made on account of sales or otherwise shall be credited on the first maturing obligation of said beneficiary," did not prevent a release of lots on payments of the stipulated sums per lot, though there were overdue installments of the balance of the price owing by the beneficiary.

5. MORTGAGES ⟹310—TRUST DEED—RELEASE BY TRUSTEE—PART PAYMENT—ESTOPPEL.
The vendor having accepted payments pursuant to which the trustee released lots, it cannot retain the money so received, and at the same time deny the authority of the trustee to make the releases and recover the lots, in the absence of any claim of fraud or misconduct.

6. MORTGAGES ⟹310—SALE BY TRUSTEE—DISQUALIFICATION.
Though antagonism had developed between the vendor and trustee under a deed of trust made to secure payment of the balance of the purchase price, it was not error to permit such trustee to sell the property on default of payments, where the vendor's interests were properly safeguarded by court's order, under which the trustee was authorized to perform only ministerial functions.

Appeal from the District Court of the United States for the Southern Division of the Southern District of California; Oscar A. Trippet, Judge.

Suit by the United Real Estate & Trust Company, a corporation, against Lucien A. Blochman and others. From the decree entered, plaintiff appeals. Modified and affirmed, without costs.

Isaac E. Congdon, of Omaha, Neb., and A. Haines and Charles C. Haines, both of San Diego, Cal., for appellant.

A. H. Sweet, F. W. Stearns, C. H. Forward, and R. C. Springer, all of San Diego, Cal., for appellees Union Title Co. of San Diego and Union Trust Co. of San Diego.

Sam Ferry Smith, of San Diego, Cal., and Laurence Hammond Smith, of San Francisco, Cal., for appellee Blochman.

Theron Stevens, James G. Pfanstiel. and Frank H. Heskett, all of San Diego, Cal., for appellee Haskins.

Before GILBERT and HUNT, Circuit Judges, and DIETRICH, District Judge.

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DIETRICH, District Judge. The plaintiff and appellant, a Nebraska corporation, being the owner of a 40-acre tract of land within the city limits of San Diego, Cal., agreed to sell the same to the defendant Blochman for $150,000, and accordingly, $25,000 having been paid on account of the purchase price, the property was, by deed dated September 15, 1912, conveyed to the defendant Union Title & Trust Company of San Diego, to be held and disposed of by it pursuant to the terms of a declaration of trust to which plaintiff and Blochman assented. After reciting the payment of $25,000 to the plaintiff, called the payee, by Blochman, called the beneficiary, it was provided that the beneficiary was to pay to the title and trust company, called the trustee, the other $125,000, as follows: $25,000 within 9 months, $25,000 within 15 months, $25,000 within 21 months, and $50,000 within 24 months from August 1, 1912; all deferred payments to bear interest. There is a further provision, which will be more particularly referred to later, authorizing the platting of the tract by the beneficiary, and the release of lots by the trustee from the plaintiff's lien. The beneficiary was to pay all taxes, and in case of his failure to do so the plaintiff might pay the same, and the amount or amounts so paid should, with interest, "constitute an additional indebtedness to be paid by said beneficiary, and before he shall become entitled to have a deed from the trustee for any lot or part of said real property." Upon receiving the balance of the purchase price, together with interest, and an additional amount sufficient to cover taxes or other charges which the plaintiff might be compelled to pay, and the expenses of the trust, the trustee was to turn over the residue, if any, of money in its hands, to the beneficiary, and to convey to him or his assigns any unsold portion of the land. It was also provided that in case of certain defaults the plaintiff could declare the whole of the principal sum at once due and payable, and upon demand of the plaintiff it was made the duty of the trustee to sell the land in the manner and upon notice as prescribed in the declaration; detailed provision being made for such sale. Thereafter, in November, 1912, Blochman entered into an agreement with one Hampton for the assignment of his interest, and caused the tract to be surveyed by Hampton for townsite purposes, and a plat thereof, under the name of La Binda Park, to be presented to the trustee for its signature and acknowledgment, as provided in the declaration of trust, which plat, after acceptance by the city council, was filed for record in the county recorder's office on March 5, 1913. Hampton defaulted, and on April 28th Blochman transferred the contract to the La Binda Park Syndicate, a company which he had organized; the syndicate assuming his obligations as purchaser. The beneficiary (Blochman and the syndicate) fell into default on account of interest and the first payment of $25,000, and after taking some steps toward a formal declaration of default, and a foreclosure and sale of the tract, the plaintiff agreed to waive the default and accept the total amount then due according to the terms of the declaration of trust, and accordingly, on the 30th of June, 1913, the beneficiary paid to the trustee, for the credit of the plaintiff, $28,464.07, the overdue principal and interest in full. In October of the same year another payment was

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made, more particularly to cover the then accrued interest of $2,671,-75. No other payments were made, and in November the beneficiary again fell into default, from which it was never relieved.

The lower court found that there was due the plaintiff, on account of principal and interest and taxes, the aggregate sum of $130,817.-90, with interest thereon from March 15, 1916, at the rate of 7 per cent. per annum, and decreed to it a first lien upon the whole of La Binda Park, with the exception of 30 lots therein, which it was held had been released by the trustee from the plaintiff's lien under the provisions of the declaration of trust. The appellant is content with the amount awarded, but maintains that its lien should extend to all of the lots, and here arises the first, and practically the only important, question. There is no serious difference of view as to the facts, and the principal controversy grows out of the construction to be given to the contract, the pertinent provisions of which are as follows:

"It is understood and agreed by the trustee, beneficiary, and the payee herein mentioned that the said real property may be subdivided into smaller tracts, lots, blocks, or subdivisions, and that the signature of the trustee herein to the proprietor's acknowledgment of the map or plat of said subdivision shall bind all the parties hereto, and the said trustee is hereby authorized and directed to sign and acknowledge as proprietor such map or plat subdividing said land as shall be presented to it for signature by the beneficiary hereunder; it being understood and agreed that said land, when subdivided as aforesaid, shall have and contain, in addition to the streets, alleys, and public grounds, at least 250 lots, none of which shall have a street frontage of more than 55 feet, except corner lots, which may have a frontage of not more than 100 feet; and it being further understood and agreed that said beneficiary will expend in the subdivision, laying out, platting and preparation for sale of said real property at least the sum of twenty-five thousand dollars ($25,000) on or before the 1st day of March, 1913.

"All the costs and expenses of said subdivision, and all surveys, mapping, platting, and filing maps, shall be borne and paid by said beneficiary.

"It is further agreed that, when so subdivided, said real property may be sold by the beneficiary hereunder, or his assigns, upon payment to the said trustee for the benefit of said payee a sum equal to one thousand dollars ($1,000) for each and every inside lot, and twelve hundred dollars ($1,200) for each and every corner lot, described in said subdivision or plat, which sums shall be paid by the trustee to the payee as soon as received in full, and without any reduction or any cost or expense whatever to the payee. And the said payee does hereby authorize and direct the said trustee to execute deeds on any lot or lots to the order of the beneficiary herein, or his assigns, whenever there shall have been paid to said trustee for the account of said payee the sum per lot as hereinbefore stated."

The releases of the 30 lots which the trustee assumed the right to give were made in connection with the raising of the money used for the two payments above mentioned, aggregating between $30,000 and $31,000. Some of the lots appear to have been sold outright, and as to certain others the precise nature of the transaction is not entirely clear; but apparently, when the suit was commenced, the trustee still held the legal title thereto, subject to declarations of trust given by it in favor of divers interested persons. But in this connection it is important to note that in every case such disposition as was made was with the understanding on the part of the trustee, the beneficiary, and the party furnishing the money that the lots would be released from the plaintiff's lien, and it is wholly improbable that any part of the

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money could have been procured, or would have been paid to the plaintiff, without such an understanding. Furthermore, the beneficiary claimed the right to demand releases, as the money was paid, at the rate of one lot for each $1,000, and the trustee assumed that it was its duty to comply with such demand. These facts at once distinguish and render inapplicable certain of the decided cases relied upon in the briefs.

[1] The plaintiff objects, first, that the provision for release did not become operative, for the reason that the beneficiary failed to expend "in the subdivision, laying out, platting, and preparation for sale of said real property, at least the sum of $25,000"; its contention being that the expenditure of this amount for the purposes stated was a condition precedent to the right of the beneficiary to sell and the power of the trustee to release. Not without reason, it complains of the manner in which the tract was subdivided and platted, with streets only 25 feet in width, and alleys 7 feet, but clearly the trustee is chargeable with no negligence in this respect, for it was granted no discretion and assumed no responsibility. It was not only authorized, but "directed," "to sign and acknowledge as proprietor such map or plat subdividing said land as shall be presented to it for signature by the beneficiary." In signing and acknowledging the plat, therefore, it simply performed its plain duty. It was under no obligation to see that $25,000 was spent before the subdivision was made. Nor, indeed, could it have been the intention of the parties that this amount should be expended before the plat was accepted and filed. Presumably most of the expenditures would be for grading the streets, clearing the lots, laying sidewalks, etc., and naturally such work would be done after the lines had become definitely fixed by the acceptance and filing of the plat.

[2] Great stress is laid upon the phrase "when so subdivided"; but, when considered in connection with the other provisions, it is somewhat of a strain to construe this language as meaning that after, and only after, the expenditure of $25,000 in platting and improving the tract, could sales be made. There is an express provision against transfers or releases so long as the beneficiary should be in default in reimbursing the plaintiff for delinquent taxes paid by it, and if the right to sell or transfer was intended to be conditioned upon the prior expenditure of $25,000 for platting and improvements, it is strange that such a condition was left unexpressed. It may be admitted that upon the whole the language is equivocal, and that the intent of the parties is left uncertain; but such doubt as there is must be resolved in favor of the trustee, for the reason that the instrument was prepared by the plaintiff.

[3] Nor do we think that the authority of the trustee to release was intended to be limited to cases of "sale" in the strict and narrow sense contended for by the plaintiff. No substantial reason is apparent why such restriction would be insisted upon by the plaintiff or assented to by Blochman. It was required that there should be at least 250 lots (as a matter of fact the number was greater), which, without taking into account the additional price to be paid for corner lots, would, at $1,000 each, yield twice the amount of the unpaid balance of the pur-

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chase price. The plaintiff may therefore have very reasonably assumed that it was amply protected. There is no evidence that it deemed it material to know what consideration, if any, Blochman received, or what he did with the lots, provided he turned over to the trustee for its credit the stipulated amount, and we entertain no doubt that the term "sold" was used in a general sense, and that the real understanding of the parties is expressed in the sentence reading:

"And the said payee does hereby authorize and direct the said trustee to execute deeds on any lot or lots to the order of the beneficiary herein or his assigns, whenever there shall have been paid to said trustee for the account of said payee the sum per lot as hereinbefore stated."

[4] The plaintiff further contends that releases could not be given for payments made upon overdue or fully matured obligations. The basis for the argument upon this point is supposed to be found largely in the paragraph reading:

"Whenever one thousand dollars ($1,000) shall be paid to said payee on account of said sum of $125,000, the interest on the amount so paid shall cease, and all payments made on account of sales or otherwise shall be credited on the first maturing obligation of said beneficiary."

It is true that upon the payment of an overdue obligation the interest necessarily ceases to run, and an express provision to that effect would be unnecessary; but it is to be borne in mind that the language of this paragraph is general, and does not relate alone to the application of proceeds derived from the sale of lots, but to payments of all kinds, regardless of the sources thereof. Hence the language employed is comprehensive enough to cover all possible cases. The phrase "first maturing obligation" does not look to the future alone; it means the obligation longest overdue, or the one next to mature, as the case might be. In either case, the obligation would be the "first maturing" one. So, also, if at any time $1,000 is paid on account of the principal sum of $125,000, the interest on that amount ceases. If it happens that the application is upon a matured portion of the $125,000, the provision is unnecessary; but, inasmuch as payment might be made upon either a mature or an immature item, the general language is very properly employed.

It is not necessary to consider the extreme limit to which the right of release would under any circumstances extend, or to determine whether it would or would not exist after the plaintiff had taken legal steps to enforce its security, or had declared the beneficiary's default and had declined longer to recognize his right to complete the purchase under the terms of the contract. The money procured from the disposition of the 30 lots was to be used to discharge the beneficiary's obligations, and the plaintiff having promised to accept it, and waive past defaults, actual payment to the trustee operated to reinstate the beneficiary and reinvest him with the right to proceed with the purchase upon the terms specified in the contract. He was not repudiating or abandoning his obligations, but was performing them.

We have examined the numerous cases collected in the briefs, but most of them may be dismissed with the suggestion that they are readily distinguishable because of provisions in the contract unlike those here

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involved. Of the others, some tend to favor one side and some the other, and they are so equally divided that it cannot be said that there is any decisive preponderance. Those most clearly supporting the plaintiff's contention, perhaps, are Clarke v. Cowan, 206 Mass. 252, 92 N. E. 474, 138 Am. St. Rep. 388, Fulton v. Jones, 167 App. Div. 765, 153 N. Y. Supp. 87, and Stephens v. Keen, 68 Fla. 558, 67 South. 226; and those for the defendants are Vawter v. Crafts, 41 Minn. 14, 42 N. W. 483, Gammel v. Goode, 103 Iowa, 301, 72 N. W. 531, Nims v. Vaughn, 40 Mich. 356, Lane v. Allen, 162 Ill. 426, 44 N. E. 831, Am. Net & Twine Co. v. Githens, 57 N. J. Eq. 539, 41 Atl. 405, and Chrisman v. Hay, 43 Fed. 552. And in connection with Clarke v. Cowan, see Clark v. Fontain, 144 Mass. 287, 10 N. E. 831. While the question is not entirely free from doubt, in view of the fact that there is no limitation expressed or clearly implied in the contract, we are inclined to hold that, under the circumstances existing at the time, the trustee was justified in concluding that it should yield to the beneficiary's demand for releases of specifically designated lots, at the rate of one for each $1,000 paid upon the condition and with the understanding that such releases would be given. It is not thought to be important that conveyance of legal title to the lots had not been actually made to the beneficiary, or upon his order, when the suit was commenced. It was sufficient that the trustee had declared that it held the legal title subject to his order.

[5] It is to be added that, even if these doubtful questions were to be resolved in favor of the plaintiff, still it could not succeed. In good conscience it cannot hold the $30,000, and at the same time take back the entire consideration for which it was paid. True, the beneficiary made payment upon account of an obligation he was generally bound to discharge; but he paid with the understanding and upon the consideration that the lots would be released. But, be his rights what they may, the loss here would fall primarily upon either the third parties, who actually furnished the money that went to the plaintiff, in reliance upon the promise that the lots would be released, or upon the trustee. There is no suggestion of fraud or bad faith on the part of the trustee or any purchaser or creditor. The most that can be said is that they acted under a mistaken view of the law and of the meaning of the contract. Strictly speaking, perhaps, it is not a case for the application of the principle of estoppel against the plaintiff, for apparently it was without knowledge of the sources from which the funds were derived or the understanding upon which they were turned over to and received by the trustee. But the plaintiff is here seeking equity, and it must do equity. Upon learning, in December, 1913, what had been done, if it desired to repudiate the transaction as being unauthorized, it should have tendered back the money which it had received; this it did not do, and does not now offer to do. It would be our duty to decline to aid it in any effort to profit by reason of the mistake.

[6] It remains to consider other assignments of minor importance. Plaintiff complains of those portions of the decree authorizing the trustee, subject to the supervision of the court, to make a sale of the

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premises, investing it with discretion to sell in parcels or in one body, and awarding it $500 as compensation and $250 on account of attorney's fees. While under the circumstances we are inclined to think it would have been better if a special master had been appointed, with the requirement of bond and official oath, we cannot see how the plaintiff can be prejudiced in so far as the trustee is authorized to perform only ministerial functions. It is quite apparent, however, that over the objection of the plaintiff the trustee should not be invested with discretionary power. There can be no doubt that a feeling of antagonism has developed in the course of the litigation. The plaintiff has made charges of improper conduct against the trustee, and these it resents. Besides, the issues here have been such as to make the trustee and the beneficiary natural allies in the litigation. While not implying that the trustee would be consciously moved by such considerations, we cannot close our eyes to human frailty, and surely no litigant would be satisfied with a juror whose judgment is subject to such disturbing influences. With much show of reason, plaintiff contends that the tract should be sold as a whole. If, as it argues, steps should be taken to vacate the apparently absurd and indefensible plat, the sale of a lot here and there in the tract would render efforts to that end extremely difficult, if not entirely futile. The only assurance the beneficiary can rightfully demand is that the property bring the highest aggregate amount which it is possible to obtain. This assurance he will have, if the trustee is directed first to offer the tract in parcels, such as the defendant may designate, and then to offer it as a whole, and to accept, subject to confirmation by the court, the bids or bid which will yield the largest return.

Accordingly the cause will be remanded, with instructions to modify the decree in such manner that it will so direct. With this qualification, it will be affirmed. We find no sufficient ground for disturbing the allowances for compensation to the trustee and for attorney's fees. No costs on appeal are awarded.

(244 Fed. 695)

RIDDELL v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. August 6, 1917. Rehearing Denied October 8, 1917.)

No. 2877.

1. POST OFFICE ⟹48(4)—USING MAILS TO DEFRAUD—INDICTMENT.

An indictment for using the mails to defraud *held* sufficient to state an offense, where it charged that defendant and others devised a scheme to subdivide and sell tracts of practically worthless land in small tracts for orchard purposes, and carried out the same by means of letters, circulars and copies of photographs sent through the mails, which fraudulently misrepresented the land as to its location, character, and value.

2. POST OFFICE ⟹48(4)—USING MAILS TO DEFRAUD—INDICTMENT.

An indictment for using the mails for carrying out a scheme to defraud, which sets out the scheme in detail in the first count, may, in other counts, describe it by reference to the first.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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3. CRIMINAL LAW ⟹371(1)—PROSECUTION FOR USING MAILS TO DEFRAUD—EVIDENCE.

In a prosecution for using the mails to defraud, where the evidence showed that defendant and others devised a scheme to subdivide certain lands which were practically worthless and sell the same by means of advertising matter sent through the mails, but that they afterwards and more than three years prior to the indictment abandoned such lands and substituted other land to which they transferred the contracts of purchasers, and which they also fraudulently misrepresented, evidence of their acts and representations with respect to the first lands was admissible with proper instructions on the question of intent.

4. CRIMINAL LAW ⟹825(1)—PROSECUTION FOR USING MAILS TO DEFRAUD—INSTRUCTIONS.

Instructions given on the trial of a defendant charged with using the mails to defraud *held* proper and sufficient, in the absence of request for more specific instructions.

In Error to the District Court of the United States for the District of Oregon; Robert S. Bean, Judge.

Criminal prosecution by the United States against H. H. Riddell. Judgment of conviction, and defendant brings error. Affirmed.

The plaintiff in error was defendant in the court below to an indictment charging that at a certain time and place within the jurisdiction of the court the defendant, together with one Conway and one Richet, devised and intended to devise a scheme and artifice to defraud one Mrs. Patsy Doran, and other persons to the grand jurors unknown, and to obtain from them and each of them money and property, which scheme and artifice the indictment alleged to be, in substance, this:

That the defendant, and Conway and Richet, acting personally and as officers of an Oregon corporation, called Oregon Inland Development Company, would falsely and fraudulently pretend, represent, promise, and hold out to said Mrs. Doran and other persons to the grand jurors unknown, and to the public generally, that the company was the owner of 40,000 acres of land in Oregon which it and its said officers intended to and would subdivide into 3,086 farms of the following numbers and sizes, to wit, 2,712 farms of 10 acres each, 200 of 20 acres each, 150 of 40 acres each, 20 of 80 acres each, 2 of 160 acres each, one of 320 acres, and one of 640 acres; that the company was the owner of 3,086 town lots in the town site of Klamath Falls, Or., and that the said defendant and his said associates and the said company would sell one farm and one of the town lots for $240, payable $10 down and $10 each month until fully paid, and, further, that the entire 40,000 acres was farm and fruit land of high quality constituting parts of sections 16 and 36, and situate in Baker, Crook, Curry, Douglas, Grant, Harney, Jackson, Klamath, Lake, Linn, Lincoln, Malheur, Sherman, Union, Umatilla, Wallowa, Wasco, and Wheeler counties. That the said lands were adjoining and contiguous in many instances to lands then being farmed and planted with fruit trees, and that the lands so pretended to be owned by the company were also fruit and orchard lands. That the said 40,000 acres, and the said 3,086 town lots, were owned in fee by the company, and that any person or persons purchasing under contracts offered for sale by the defendant and his said associates and the said company would receive good title thereto. That deeds to the said 40,000 acres which vested title thereto in the company had theretofore been executed by John Veasen and Lulu Veasen, husband and wife, under date April 25, 1910. That the said scheme and artifice was to be further executed by the said defendant and his said associates and the said company, increasing the price to be paid by the purchasers from $240 to $300 for each tract, and by falsely and fraudulently printing, issuing, circulating, and distributing a certain illustrated booklet entitled, "Grande Ronde District, Oregon," which booklet contained, among

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other things, a pretended map of Union and Wallowa counties, and of portions of Baker county, Or., which map had large portions of those counties identified in red colors. That the defendant and his said associates would and did further falsely and fraudulently pretend and hold out to the persons aforesaid and to the public generally that each of the townships on said map outlined in red contained 10 and 20 acre tracts and farms owned by the company. and were neither mountainous nor swamp lands. That the town lots so represented to be owned by the company were contiguous and adjacent to the town of Klamath Falls and a part of it, and that each of the lots was worth the "amount of the selling price of the contracts of said company," whereas, in truth and in fact and as the defendant then and there well knew, the said lots were not contiguous or adjacent to the town of Klamath Falls nor a part thereof, and were not less than a mile and a half distant from the nearest portion of the town, and not less than two miles from its business portion, were not of the value represented, and were and are of little or no value. That in furtherance of the scheme and artifice and as a part and portion thereof the defendant and his said associates would and did cause to be printed, mailed, circulated, and generally distributed large numbers of a certain poster which had written across it in bold red ink "Grande Ronde District, Oregon," and which poster had delineated upon it numerous half-tone reproductions of photographs named, labeled. and described by the designations, "Native Hay Scene on our Land near Promise." "Scene on our Land in Baker County, Note the Deep Soil on Creek Bank," "Trout Stream Crossing One Corner of our 20-Acre Tract Southeast of Elgin," "Scene on our Land West of La Grande," "Part of our Land Near Enterprise," "Part of our Land Near North Powder," "Part of our Land in Baker County Showing Creek," "Scene on One of our 40-Acre Tracts Near Imbler," "Part of our Land Near La Grande, Note the Gentle Slope," which statements, labels, legends, and delineations were false, fraudulent, misleading and untrue in every part as he, the said defendant, then and there well knew, and when, in truth and in fact, as the said defendant then and there well knew, the said company did not own or have any lands in either Baker or Wallowa county, Or., and when in truth and in fact, and as the said defendant then and there well knew, the cut and reproduction labeled "Native Hay Scene on our Land Near Promise" was not a reproduction of a scene on any land owned by said company, and when in truth and in fact, and as the said defendant well knew, the said company had and owned no lands near Promise. with similar allegations respecting the other labels and designations, and when in truth and in fact, as he, the defendant, then and there well knew, the said company was not the owner of 40,000 acres of farm land in the state of Oregon, nor of 3,086 town lots in the town site of Klamath Falls, Or., and when in truth and in fact, as the defendant then and there well knew, the said 40,000 acres of land so claimed to be owned by the company was not only not farm or fruit land of high quality, but was "high, bleak, cold, rocky, nonarable, nontillable, scab, and mountainous land fit only for use as grazing land, and totally unfit for orchard culture and cultivation." That the lands contiguous to and adjoining the said 40,000 acres so claimed by the said company were not, as the defendant well knew, capable of being farmed or planted with fruit trees, and that in truth and in fact, as the defendant then and there well knew, the deeds so claimed to be executed by said John Veasen and Lulu Veasen did not vest title to the lands therein described in the said company, for the reason that the said deeds were to be placed in escrow and were never delivered to the said company, or to any representative thereof. That in truth and in fact the said company owned and owns, as the said defendant then and there well knew, no lands in either Baker or Wallowa counties, Or., and owned lands in but six of the said townships so designated in red, and when in truth and in fact, and as the said defendant then and there well knew, the said 10 and 20 acre tracts advertised for sale in and by the circular and pamphlet entitled "Grande Ronde District, Oregon," were not only not orchard lands of high grade and quality, but were "high, bleak, rough, rocky, frosty, nonarable, nontillable, and inaccessible mountainous lands." That the said scheme and artifice was

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made and entered into by the defendant and the said Conway and Richet to defraud the said Mrs. Doran and other persons to the grand jurors unknown and the public generally. That in pursuance of it the indictment alleges in count 3, at a time and place stated, the defendant knowingly, unlawfully, and feloniously placed and caused to be placed in the post office at Portland, Or., for mailing and delivery, a certain letter reading as follows:

"Oregon Inland Development Company Incorporated. 1121-1122-1123 Yeon Building. Address All Communications to the Company. Phone Main 133. Frank Richet, President Treasurer. J. T. Conway, Pres. & Gen'l Mgr. H. H. Riddell, Secretary.

"Portland, Oregon, 6/26/11.

"W. C. Hayward, Manilla, Iowa—Dear Sir: The sale of our contracts on the auction plan will close in the very near future. We are placing on the market and have sold several ten acre tracts, which we are selling on terms of $10 down and $10 per month without interest or taxes. The purchase price being $300 per tract. There is no town lot in connection with this new proposition. It is a straight purchase of a specified ten acre tract. We have decided to permit a number of our present contract holders on the auction plan to select one of these ten acre tracts in lieu of their present contracts: crediting them with the amount they have previously paid together with discount, if any, to apply on the purchase of a ten acre tract. In addition to this, they will receive a town lot at Klamath Falls when the same is allotted as per their original contract.

"In addition to these $300 tracts we have some higher priced lands that are selling at $400 and $500 per tract. We will also, upon request, accept transfer of the present contracts to apply on these higher priced lands. Contract holders may at their pleasure select a representative at their own expense and send him to La Grande from which point we would take him to make inspection and selection—for his people. We cannot, however, hold a large body of this land off the market unless some action is taken immediately. We herewith inclose plats of 32 ten acre tracts. We are writing our representative in Iowa, M. Hillias, 505 W. Broadway, Council Bluffs, Ia., and would suggest that you work in conjunction with him inasmuch as it would prevent two people selecting the same tract. He can arrange for you to have your acreage adjoining that of a neighbor if you and they so desire. We wish to urge upon you the necessity of immediate action inasmuch as that if you fail to take advantage of this offer at this time, and decide later that you wish a specified ten acre tract, it will of course necessarily be located farther out than our present offerings, and we cannot at this time agree to transfer your contract if you do not make immediate application. Call and see Mr. Hillias at once and oblige,

"Yours very truly, Oregon Inland Development Company,
"J. T. Conway, Vice-Pres. & Gen. Mgr."

Counts 4 and 5 of the indictment allege that the defendant, in further pursuance of the said alleged scheme and artifice, at certain specified times deposited, or caused to be deposited, in the post office at Portland certain specified "clearance receipts" relating to the sale of portions of the alleged lands of the alleged schemers, one alleged to have been issued in favor of E. H. Bryant of Gallup, N. M., and the other in favor of J. K. Hartline, of Albuquerque, N. M.

The indictment originally contained seven counts, to the last two of which a demurrer was sustained, and respecting the first two of which there was no proof of the deposit in the mails of the letters as therein alleged.

The trial resulted in the conviction of the defendant under counts 3, 4, and 5, and he has brought the case here by writ of error.

E. B. Dufur and Giltner & Sewall, all of Portland, Or., for plaintiff in error.

Clarence L. Reames, U. S. Atty., and John J. Beckman, Asst. U. S. Atty., both of Portland, Or.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

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ROSS, Circuit Judge (after stating the facts as above). [1] The contention that the indictment is insufficient to state an offense under the provisions of section 215 of the Criminal Code, upon which it is based, is, we think, wholly without merit. Indeed, it is difficult to conceive of a more brazen attempt to defraud the unwary of their money than it sets forth. Durland v. United States, 161 U. S. 306, 16 Sup. Ct. 508, 40 L. Ed. 709; Oesting v. United States, 234 Fed. 304, 148 C. C. A. 206; Walker v. United States, 152 Fed. 111, 81 C. C. A. 329; Moffatt v. United States, 232 Fed. 522, 146 C. C. A. 480; Colburn v. United States, 223 Fed. 590, 139 C. C. A. 136; Spear v. United States, 228 Fed. 487, 143 C. C. A. 67.

[2] It is true that neither of the counts under which the plaintiff in error was convicted set out the alleged fraudulent scheme in detail, but each of them refer to and make part thereof, as they properly may, the scheme set out in the first count. Blitz v. United States, 153 U. S. 308, 14 Sup. Ct. 924, 38 L. Ed. 725; Crain v. United States, 162 U. S. 625, 16 Sup. Ct. 952, 40 L. Ed. 1097; Glass v. United States, 222 Fed. 773, 138 C. C. A. 321.

The record shows that in the execution of the alleged scheme the company, under the directorship of its officers—Conway, Richet, and the defendant—secured many thousands of dollars, for which acts the two former have heretofore, upon a similar indictment, been convicted.

The plaintiff in error insisted in the testimony given by him that he was entirely ignorant of the true character and situation of the lands in question, and, while admitting that he was a stockholder and the secretary of the company, testified that the stock that he held was for the benefit of Veasen, and that his only interest in the company was the salary he received as its attorney. That his private office adjoined and opened into that of the company; that he was active in the performance of his duties as its secretary, and himself framed or examined many of the letters, circulars, posters, and other papers issued by the company—was also admitted by him in his testimony, and there was on the part of the government much evidence given, tending to show that he was in fact a party to the alleged unlawful undertaking. That question of fact was, of course, left to the determination of the jury by the trial court, and under fair and correct instructions upon the point, and was resolved by the jury against the defendant.

There are but two more alleged errors occurring on the trial that we think need be specially mentioned.

[3] It appeared from the evidence in the case that the company was organized for the purpose of exploiting the lands covered by the deed alleged in the indictment to have been executed by John Veasen and his wife April 25, 1910, but never delivered, and that in the fall of that year the company and its officers—Conway, Richet, and the defendant—ceased all efforts in regard to those lands, and transferred them to lands situate in Union, Wallowa, and Baker counties of the same state, for which the company had entered into a contract with one Hibbard, the holders of contracts for the purchase of the Veasen lands

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being notified by the company that they would be given in lieu thereof similar contracts for the purchase of the Hibbard lands.

It is urged that the court below erred in admitting in evidence acts of the company and its officers respecting the Veasen lands. While, as the court below expressly instructed the jury, the defendant could not be convicted for any act or acts committed in respect to those lands, since all such acts ceased more than three years before the filing of the indictment, the acts of the company and its officers in regard thereto were, in our opinion, clearly admissible upon the question of the intent with which their acts in regard to the Hibbard lands were performed; for the scheme alleged in the indictment was continuous in character, and applied to the lands situate in Union, Wallowa, and Baker counties, as well as to the Veasen lands. That the evidence objected to was properly limited by the court below clearly appears from this excerpt from its charge:

"The evidence concerning the organization of this corporation and its transactions during the time that it was exploiting the Veasen lands has been admitted, and is to be considered by you in order that you may ascertain and determine the nature and character of the business in which these people were engaged, and whether or not it was a fraudulent scheme; but, even if you should believe that up to the time the parties began operating in Eastern Oregon the scheme was fraudulent and a violation of the statute, it would not justify you in convicting the defendant, unless you should believe further that, after the company began operating in Eastern Oregon, it continued to maintain and operate as a fraudulent scheme and with intent to defraud the parties with whom it thereafter contracted. The acts set up in the indictment are charged as having been done on a certain date stated therein. The government is not confined in its proof to the dates set forth in the indictment, but it is bound, under the statute of limitations, to prove that the acts of the defendant on which a conviction is asked took place within three years prior to the finding of the indictment. Unless, therefore, you can find from the evidence beyond a reasonable doubt that subsequent to the 23d day of May, 1911, there was a fraudulent scheme and device, as set out in the indictment, and that the defendant was a party thereto, and that subsequent to that date he mailed, or caused to be mailed, one or more of the writings heretofore specified in the charge of the court, you must necessarily find him not guilty. Your inquiry, therefore, will be largely confined to a consideration of the nature and character of the business in which these people were engaged while they were exploiting the Union county lands, but in determining such nature and character, you have a right, as I suggested a moment ago, to consider the entire transaction, the circumstances under which the corporation was organized, the purpose for which it was organized, how it was organized, how it was conducted, and from that determine whether they were carrying on an unlawful scheme to defraud in exploiting the Union county land, and within three years prior to the finding of this indictment."

In the similar case of Samuels v. United States, 232 Fed. 536, 542, 146 C. C. A. 494, 500 (Ann. Cas. 1917A, 711), the Circuit Court of Appeals of the Eighth Circuit, in speaking of the admission in evidence of certain letters, circulars, and advertisements which were not referred to in the indictment, said:

"As the fraudulent intent is one of the material allegations in the indictment, evidence of other and similar ventures by the accused are properly admissible as bearing on the question of intent. The intention of a person charged with a crime can hardly ever be shown by direct evidence, and for this reason it is permissible to introduce evidence of other acts of a similar nature,

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especially when committed continuously, and for a long period of time, thereby establishing the fraudulent intent."

In addition to the authorities there cited, see Farmer v. United States, 223 Fed. 903, 911, 139 C. C. A. 341; Stern et al. v. United States, 223 Fed. 762, 139 C. C. A. 292; Sprinkle v. United States, 141 Fed. 811, 816, 73 C. C. A. 285; Shea v. United States, 236 Fed. 97, 149 C. C. A. 307.

[4] The only other point that we think merits special notice is the contention on the part of the plaintiff in error that the effect of the instructions of the court below was that the jury was authorized to find the defendant guilty (as it did) under counts 3, 4, and 5, even though he only deposited, or caused to be deposited, in the post office one letter. It is quite true that each letter or other paper put into the post office in violation of the provisions of the statute constitutes a separate and distinct offense (In re Henry, 123 U. S. 372, 8 Sup. Ct. 142, 31 L. Ed. 174), and that there could be no legal conviction of the defendant under any count of the indictment without proof of the deposit in the mail of the letter or document therein charged to have been so deposited; and such, we think, is the true meaning of the instructions given by the court when read together, as they must be; and such, we think, must have been the understanding of the jury. Indeed, the court expressly charged the jury to disregard (as they did) the first two counts of the indictment, for the very reason that the government offered no evidence tending to show that the letters alleged in those counts to have been deposited, or caused to be deposited, by the defendant were in fact so deposited. If the defendant desired any more specific instruction upon the subject, he should have taken exception to the charge of the court at the time, bringing to its notice the ground of such exception, which, according to the record, he wholly failed to do.

The judgment is affirmed.

(244 Fed. 701)

AMERICAN SURETY CO. OF NEW YORK v. SANDBERG et ux.

(Circuit Court of Appeals, Ninth Circuit. August 20, 1917. Rehearing Denied October 8, 1917.)

No. 2951.

1. INDEMNITY ⟹15(4) — VOLUNTARY SURETYSHIP — INDEMNIFICATION OF SURETY.

The fact that at the time of signing an agreement of indemnity the indemnitor was himself indemnified against loss does not affect the nature of his suretyship, or change its character from that of a voluntary act of accommodation.

2. HUSBAND AND WIFE ⟹268(6)—COMMUNITY PROPERTY—HUSBAND'S CONTRACT.

Where a husband, as a voluntary act of accommodation, signed an agreement to indemnify a surety company against loss by reason of its execution of a bond of a construction company to a paper company to secure performance of a contract of the construction company, the execu-

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tion of the indemnity agreement resulting in no benefit to the community property of the husband and his wife, the indemnity liability incurred by the husband was not a charge against the community property.

In Error to the District Court of the United States for the Southern Division of the Western District of Washington; Edward E. Cushman, Judge.

Action at law by the American Surety Company of New York, a corporation, against Peter Sandberg and Mathilda Sandberg, his wife. To review a judgment (225 Fed. 150) dismissing the action as to Mathilda Sandberg, plaintiff brings error. Decree affirmed.

The plaintiff in error brought an action against the defendants in error to recover $25,000, the amount of a judgment theretofore rendered against the defendant Peter Sandberg, on an agreement of indemnity which he executed on June 2, 1910, to indemnify the plaintiff against loss by reason of its executing as surety a certain bond of the Wells Construction Company, obligor, to the Powell River Paper Company, of Vancouver, B. C., obligee, to secure the performance of a certain contract between the parties last named, in the performance of which contract the construction company defaulted. The defendant Mathilda Sandberg appeared separately and answered the complaint in the present action, admitted that Peter Sandberg executed the indemnity agreement, and alleged that he executed it for the sole benefit and accommodation of the construction company, and not for the use, benefit, or profit of himself or of her, or of the community of the defendants, or for any purpose in which they were interested in any way, and that so far as she and the community were concerned, the same was without consideration. A jury trial was waived, and a judgment was rendered against Peter Sandberg for the full amount sued for, as his separate debt, the court holding that neither his codefendant nor the community real property of the defendants was affected by the lien of said judgment, and the action as to Mathilda Sandberg was dismissed.

The court made findings of fact, of which the following is the substance: That from the time of the marriage of the defendants to the present time they had used, owned, or possessed no property other than community property; that on June 20, 1910, there was no property in the possession of or under the control of Peter Sandberg which he then had, and none that he afterwards had, other than the community property and estate of himself and his codefendant and the income therefrom; that on the date when Peter signed the contract of indemnity, the construction company was engaged in constructing a building for the defendants herein, the contract price for which was $36,500, on which the defendants had paid, prior to June 20, 1910, the sum of $36,383.05; that the building was then practically completed; that the payments so made were all in cash, and there was no connection in the relationship of the defendants and the construction company in the matter of the construction of said building and the signing of said indemnity agreement; that the construction company was then in good and substantial financial condition; that Mathilda Sandberg had no knowledge of the execution of the indemnity agreement by her husband until the institution of the present action; that on May 5, 1913, a judgment was obtained by the paper company against the construction company, and against the plaintiff herein as surety in the sum of $25,000, but Mathilda Sandberg had no knowledge or notice of the pendency of the action; that neither of the defendants was ever a stockholder of the construction company, and neither had any financial interest in that company, and Peter signed the indemnity agreement at the request and for the accommodation of one Mettler, who was a large stockholder and an officer of the construction company, and an old friend of Peter's; that on the same date the construction company, Mettler, and one Vergowe executed to Peter an indemnity agreement against liability on his part; that Peter Sandberg, without the knowledge or consent of Mathilda, from time to time signed certain notes and guaranties to banks in British Columbia, in addition to the indemnity agreement above referred to, and for the use and accommodation

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of the construction company, Mettler, Vergowe, and Wells; that all such transactions except the building contract of the Kentucky building were matters and things which did not affect or concern the community of the defendants or the defendant Mathilda Sandberg, but were for the sole use, benefit, and accommodation of third persons; that the contract regarding the construction of the Kentucky building was made and practically carried out and completed prior to June 20, 1910, and was entirely disconnected with any of the other dealings of Peter Sandberg and the construction company.

William C. Bristol and Fenton E. Grigsby, both of Portland, Or., for plaintiff in error.

Bates, Peer & Peterson and Charles T. Peterson, all of Tacoma, Wash., for defendants in error.

Before GILBERT and HUNT, Circuit Judges, and DIETRICH, District Judge.

GILBERT, Circuit Judge (after stating the facts as above). [1] We find no ground to disturb the findings of fact of the court below. The fact that at the time of signing the agreement of indemnity Peter Sandberg was himself indemnified against loss does not affect the nature of his suretyship, or change its character from that of a voluntary act of accommodation for the benefit of the Construction Company.

The law of Washington (Remington's Codes and Statutes, §§ 5915, 5916) recognizes the separate property of husband and wife. In the case of the husband it is that which he owned before marriage and that which he acquired afterward by gift, bequest, devise, or descent, with the rents, issues, and profits thereof. In the case of the wife it is that which she owned at the time of the marriage or afterward acquired by gift, devise, or inheritance, with the rents, issues, and profits thereof. Section 5917 provides that:

"Property, not acquired or owned as prescribed in the next two preceding sections, acquired after marriage by either husband or wife, or both, is community property, but the husband shall have the management and control of the community personal property, with a like power of disposition as he was of his separate personal property, except that he shall not devise by will more than one-half thereof."

Section 5918 provides that:

"The husband has the management and control of the community real property, but he shall not sell, convey, or incumber the community real estate, unless the wife join with him in executing the deed or other instrument of conveyance."

The Supreme Court of Washington has held that any liability incurred by the husband in the prosecution of any business is prima facie a charge against the community, but that the presumption is overthrown by proof that the liability was not incurred in a business of which the community would have had the benefit if profit had been realized therefrom (McDonough v. Craig, 10 Wash. 239, 38 Pac. 1034); that a guaranty by the husband for the payment of goods to be furnished a corporation of which he is a stockholder, being merely a contract of suretyship, creates a separate and not a community debt (Spinning v. Allen, 10 Wash. 570, 39 Pac. 151), yet, if the husband is an officer and stockholder of the corporation and becomes surety to pro-

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tect the property and business of the corporation, and if, under the circumstance, it is to be presumed that he is acting for the community and the benefits of his act might have belonged to the community, the property of the community will be held liable (Horton v. Donohoe Kelly Banking Co., 15 Wash. 399, 46 Pac. 409, 47 Pac. 435). Again, it is held that the execution of a note as an accommodation to a bank does not bind the community where neither the husband nor the wife had any interest in the bank. Shuey v. Holmes, 20 Wash. 13, 54 Pac. 540. But it is otherwise if it is to be presumed that a benefit growing out of the husband's connection with the bank will inure to the community. Shuey v. Holmes, 22 Wash. 193, 60 Pac. 402. So, in Way v. Lyric Theater Co., 79 Wash. 275, 140 Pac. 320, it was held that notes given by a corporation, and married men who were stockholders, for the purchase of an automobile to be used as a prize for the benefit of the corporate business, are presumptively for the benefit of the communities, but that the presumption might be rebutted by proof. In Threshing Machine Co. v. Wiley, 89 Wash. 301, 154 Pac. 437, where a husband signed a note as surety only, and received no consideration, it was held that the debt was not a community debt. Such being the law of Washington as construed by the highest court of the state, it is clear that the community property of the defendants is not bound for the payment of Peter Sandberg's debt to the plaintiff.

The plaintiff contends that Sandberg's execution of the indemnity agreement resulted in benefit to the community property in this, that the construction company thereby was enabled to obtain the contract with the paper company, and thus to make money to repay to Sandberg his advances on the Kentucky building contract. But the contention is not sustained by the facts. There is no evidence that such was the purpose of Sandberg's act, or that he expected or derived any benefit to the community therefrom, and the fact was, as found by the court below, that at the time when Sandberg signed the indemnity agreement, the Kentucky building was substantially completed and paid for, and the construction company was then in good financial standing.

It is contended that the judgment rendered in British Columbia on behalf of the paper company is conclusive upon the defendants herein, for the reason that they were notified and had an opportunity to defend that action. But such is not the record. Peter Sandberg had notice of the action, but Mrs. Sandberg had not, nor was she a party to the action, and the court below found that she had no knowledge of it.

[2] Upon the facts as found by the court below, and the law as it is established in the state of Washington, we find no error in the decree which is appealed from.

The decree is affirmed.

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(244 Fed. 705)

ELVERS et al. v. W. R. GRACE & CO.*

(Circuit Court of Appeals, Ninth Circuit. August 20, 1917.)

No. 2750.

1. SHIPPING ⟹185—CHARTERS—DEMURRAGE—LIEN ON CARGO.
The reciprocal lien between ship and cargo arises only after the cargo is on board, and in the absence of contract therefor there is no maritime lien on the cargo for demurrage incurred by a charterer in the loading.

2. SHIPPING ⟹173—CONSTRUCTION OF CHARTER PARTY—CESSER CLAUSE.
No liability is destroyed by the cesser clause of a charter party, unless it is re-created in some one else by the lien clause.

3. SHIPPING ⟹173—CONSTRUCTION OF CHARTER PARTY—CESSER CLAUSE.
The lien and cesser clause of a charter party followed provisions fixing the lay days for loading and discharging and the amount of demurrage to be paid by the charterer for the excess of time consumed, and provided that "vessel to have a lien on cargo for all freight, dead freight, and demurrage, it being understood that all and any liability of the charterers under this agreement shall cease and determine as soon as the cargo is on board; all questions, whether of demurrage or otherwise to be settled with the consignees, the owners and captain looking to their lien on the cargo for this purpose." *Held*, that such clause left it doubtful whether the lien given extended to an antecedent liability of the charterers for demurrage in loading, or applied only to future liabilities, and should therefore be construed as not exempting the charterers from such liability.

Appeal from the District Court of the United States for the First Division of the Northern District of California; Maurice T. Dooling, Judge.

Suit in admiralty by Martin H. A. Elvers and Frederick A. E. Zimmer, owners of the ship Schwarzenbek, against W. R. Grace & Co., a corporation. Decree for respondent on exceptions to libel, and libelants appeal. Reversed.

For opinion below, see 231 Fed. 361.

Libelants are engaged in business in the city of Hamburg, Germany, as copartners under the firm name and style of Knohr & Burchard, Nfl., and are the owners of the steel ship Schwarzenbek. The respondent is a corporation organized and existing under the laws of the state of Connecticut, and doing business in the city of San Francisco, in the Northern district of California. On August 16, 1906, Knohr & Burchard, Nfl., in the city of London, England, chartered the Schwarzenbek to respondent to carry a cargo of sawn lumber from a mill or loading place on Puget Sound, or in British Columbia not north of Burrard's Inlet, as might be directed by charterers, to Callao, under a charter party containing, among others, the following provisions:

"Orders as to loading mill to be given within 48 hours, Sundays and legal holidays excepted, after notification to charterers or their agents in San Francisco of arrival of vessel at Port Angeles, Port Townsend, or Royal Roads, failing which lay days to count."

Charterers "shall be allowed for the loading and discharging of said vessel at the respective ports aforesaid, lay days as follows: Thirty (30) working lay days for loading, not to commence before 1st Feby., 1907, unless with charterer's consent, to commence 24 hours after vessel is at loading place satisfactory to charterers, inward cargo and/or unnecessary ballast discharged and ready to receive cargo; master having given written notice to that effect. Discharge to be given with dispatch according to the custom of the port of discharge at such safe wharf, dock, or place as charterers may direct, but

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Rehearing denied January 7, 1918.

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at not less than 35,000 feet B. M. per day. For each and every day's detention by the fault of party of the second part [charterer] or agents, they agree to pay to the said party of the first part [owners] demurrage at the rate of three pence sterling per register ton per day."

"Cargo to be stowed under the master's supervision and direction; charterers' stevedore to be employed at not exceeding $1.10."

"Vessel to have a lien on cargo for all freight, dead freight, and demurrage, it being understood that all and any liability of the charterers under this agreement shall cease and determine as soon as the cargo is on board; all questions. whether of demurrage or otherwise, to be settled with the consignees, the owners and captain looking to their lien on the cargo for this purpose."

It is alleged in the amended libel for demurrage, filed June 11, 1914, that on or about March 2, 1907, the Schwarzenbek arrived at Royal Roads, one of the loading places mentioned in said charter, and her master gave notice to respondent charterers of her arrival thereat, which notice was received by said respondent charterers at the hour of 4:30 p. m. on March 4, 1907; that on March 6, 1907, at 5:45 p. m., said respondent charterers, in response to said notice of said master, wired the master of said ship as follows: "We will load your ship millside;" that said wire did not designate or direct to which millside said vessel should proceed, nor at what time said vessel should proceed thereto; that thereafter said master wired said respondent charterers a second time, and thereafter, on March 7, 1907, received the following wire from said respondent charterers, to wit, "Millside Fraser river;" that said ship then proceeded to the designated loading place, and, with her inward cargo and/or unnecessary ballast completely discharged, was ready to receive her cargo; that her master gave written notice of said facts and said readiness on March 13, 1907; that notwithstanding the performance by the libelants of all of the conditions of said contract of charter party, and notwithstanding there was no remissness nor fault on the part of said libelants, the respondent, by its own default, did not load the said ship within the 30 working lay days in said charter party agreed upon, but, contrary to the terms of said charter party, respondent delayed said ship until May 15, 1907; that libelants, by the acts and defaults of respondent, became entitled to demand from respondent demurrage for 33 days at the rate of 3 pence per registered ton per day; that on or about May 15, 1907, the master of said ship, on the demand of charterers, but reserving the rights and claims of libelants on account of respondent's breach of the charter party as aforesaid by duly made protest, issued bills of lading to said charterers, wherein and whereby said respondent or assigns were mentioned as consignees of said cargo, but which bills of lading contained no reference to the demurrage previously incurred; that said bills of lading are in the possession or under the control of respondent, and out of the possession and control of libelants, and libelants pray for their production by respondent; that notwithstanding respondent has been requested to pay the sum of $3,762.91, the demurrage aforesaid, respondent has refused and still refuses to pay the same or any part thereof, and libelants pray judgment for such demurrage and costs.

Respondent filed its exceptions to the amended libel on July 1, 1914, alleging that the amended libel did not state a cause of action against respondent. The court filed a written opinion (Elvers v. W. R. Grace & Co. [D. C.] 231 Fed. 361), sustaining the exceptions and dismissing the libel, and entered a decree accordingly. Libelants appeal from this decree.

Andros & Hengstler, Louis T. Hengstler, and Golden W. Bell, all of San Francisco, Cal., for appellants.

Nathan H. Frank and Irving H. Frank, both of San Francisco, Cal., for appellee.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). There is but one question for review by this court, namely: Does the amend-

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ed libel state a cause of action against the respondent (appellee)? The determination of that question rests upon the construction of the charter party signed by the parties, with particular reference to the effect to be given to the lien and cesser clause therein contained.

The charter party specifically states the number of lay days which shall be allowed to the charterers for loading of the vessel, and the conditions for discharge of cargo, and then follows the agreement by the charterer, absolute in form, to pay to the shipowner demurrage at the rate of three pence sterling per register ton per day for each and every day's detention of the vessel by the fault of the charterer. The libelants here seek to recover under the liability thus created, but the respondent claims it is absolved from that liability by the lien and cesser clause later appearing in the charter, and that the libelants, not having availed themselves of the privilege afforded by the lien clause, cannot maintain the present libel against the respondent. The lien and cesser clause provides:

"Vessel to have a lien on cargo, for all freight, dead freight, and demurrage, it being understood that all and any liability of the charterers under this agreement shall cease and determine as soon as the cargo is on board; all questions, whether of demurrage or otherwise, to be settled with the consignees, the owners and captain looking to their lien on the cargo for this purpose."

In Scrutton on Charter Parties and Bills of Lading (6th Ed.) the scope and purpose of this lien and cesser clause is explained as follows:

"This clause, known as the 'lien and exemption clause,' or 'cesser clause,' is usually inserted in consideration of the granting the shipowner of a lien which he would not otherwise possess on the cargo for demurrage and dead freight." Article 53, p. 137.

[1] There is no question concerning dead freight in this case. The only subject we have to deal with is demurrage for delay in loading the vessel. There is no maritime or common-law lien for demurrage prior to loading. The reciprocal relation of the ship to the cargo and the cargo to the ship, whereby the ship is bound to the cargo and the cargo to the ship, is not established until the cargo is on board. After the cargo is loaded on the vessel there is, under the maritime law, a lien on the cargo for demurrage which will then necessarily be incurred only in its discharge. 36 Cyc. 371; The Hyperion's Cargo, 2 Lowell, 93, 12 Fed. Cas. No. 6,987, affirmed in Donaldson v. McDowell, 7 Fed. Cas. No. 3,985; Two Hundred and Seventy-Five Tons Phosphates (D. C.) 9 Fed. 209; Hawgood v. One Thousand Three Hundred and Ten Tons of Coal (D. C.) 21 Fed. 681; Davis v. Smokeless Fuel Co., 196 Fed. 753, 116 C. C. A. 381. Prior to the loading the shipowner has a right of action against the charterer upon his specific agreement to pay demurrage as provided in the charter party.

[2] The appellee contends that by the cesser clause the shipowners in this case surrendered their right to enforce this liability against the charterers, and accepted in lieu thereof a lien on the cargo. In Crossman v. Burrill, 179 U. S. 100, 107, 21 Sup. Ct. 38, 45 L. Ed. 106, the Supreme Court stated that the true rule of construction of the cesser

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clause had been settled by a series of English decisions in which that excellent commercial lawyer, Lord Esher, then lately Master of the Rolls, took a leading part, and that it was well summed up with the reasons supporting it by himself and other judges in two cases in the Court of Appeal, viz.: Clink v. Radford, [1891] 1 Q. B. 625, and Hansen v. Harrold, [1894] 1 Q. B. 612. In Clink v. Radford Lord Esher said:

"In my opinion the main rule to be derived from the cases as to the interpretation of the cesser clause in a charter party, is that the court will construe it as inapplicable to the particular breach complained of, if by construing it otherwise the shipowner would be left unprotected in respect of that particular breach, unless the cesser clause is expressed in terms that prohibit such a conclusion. In other words, it cannot be assumed that the shipowner without any mercantile reason would give up by the cesser clause rights which he had stipulated for in another part of the contract."

In Hansen v. Harrold, Lord Esher said:

"Where the provision for cesser of liability is accompanied by the stipulation as to lien, then the cesser of liability is not to apply in so far as the lien, which by the charter party the charterers are able to create, is not equivalent to the liability of the charterers."

In the Laws of England, compiled by the Earl of Halsbury (volume 26, p. 133), there is a very full statement and citation of the English authorities upon this subject, as follows:

"A charter party usually contains a stipulation, known as a cesser clause, providing that the charterer's liability under the charter party is to cease as soon as the cargo is shipped. Such a stipulation is valid, but its effect varies according to the language in which it is framed. Whatever form the stipulation may take, the exemption as regards future liabilities arising after the loading appears to be absolute. As regards antecedent liabilities, the cesser of liability depends upon the wording of the clause. The clause may expressly deal with such liabilities; it may provide that the liability in respect of them is to continue or to cease, either absolutely or conditionally upon their discharge. More usually there is no express reference to antecedent liabilities, and the extent of the exemption then depends upon the construction to be placed upon the particular stipulation employed. If it is clear from the words of the stipulation that all liabilities under the charter party, antecedent as well as future, are to cease on loading, the exemption is equally absolute in the case of antecedent liabilities as in the case of future liabilities. If, on the other hand, the words used are open to a different interpretation, the charterer's liability as to antecedent breaches of the charter party will cease only in so far as an equivalent is given to the shipowner in the shape of a remedy available against the consignee. The cesser clause will therefore be construed as inapplicable to the particular breach complained of, if the effect of a different construction would be to leave the shipowner unprotected in respect of that particular breach. To ascertain the extent of the protection conferred by a cesser clause, the lien clause which follows it and which embodies the remedy given to the shipowner as the corollary of the charterer's release must be read with it. and the two clauses must, if possible, be taken as coextensive. No liability is destroyed by the cesser clause, unless it is re-created in some one else by the lien clause. The construction of the cesser clause is therefore governed by the construction of the lien clause, and if that clause confers no lien on the shipowner in respect of the claim which is in question, the charterer's liability is not taken away by the cesser clause. Accordingly the cesser clause usually provides that it is not to take effect unless the cargo shipped is sufficient to satisfy the various liens which the shipowner may possess over the cargo."

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[3] Turning now to the cesser clause under consideration, we find that it is not clear that all liability under the charter party, antecedent as well as future, is to cease on loading. Similar clauses expressed in such ambiguous language have been held by the courts as not exempting a charterer from responsibility for delay occurring prior to loading. 36 Cyc. 352; Pederson v. Lotinga, 28 L. T. 267, 5 W. R. 290. In Christofferson v. Hansen, L. R. 7 Q. B. 500, Lord Chief Justice Cockburn, referring to a similar clause in a charter party, said, "The language is to a certain extent ambiguous;" and, stating the two constructions that might be placed upon the clause, he mentioned them as one relieving the charterer from all liability both before and after loading, and the other relieving the charterer from only such breaches as might occur after loading. The court adopted the latter construction, Mr. Justice Blackburn saying:

"If persons wish and intend to get rid of all liability, past as well as future, they can very easily do so by expressing themselves in unambiguous language."

In Schmidt v. Keyser, 88 Fed. 799, 32 C. C. A. 121, the Circuit Court of Appeals followed the last-mentioned case in holding that:

"Where the charter party provided that all liability on the part of the charterer should 'cease as soon as he shipped the cargo,' * * * the clause applied only to liability accruing after the loading, and did not relieve the charterer from liability accruing before the completion of the loading."

It comes, then, to this: If we find the meaning of the clause not clear, but doubtful, that, in and of itself, is a sufficient reason why we should not construe it as relieving the charterer from his stipulated liability for breaches prior to loading. Then if, upon examining the terms of the clause, we find that it provides for a surrender of the right of action against the charterers for liability for demurrage antecedent to loading, and no equivalent remedy is given the shipowners available against the consignees; that the liability destroyed by the cesser clause is not re-created in some one else by the lien clause; that it confers no lien on the shipowners with respect to the antecedent liability of the charterers, and therefore leaves the shipowners unprotected in respect to that particular breach; and that the lien conferred is not commensurate with the liability of the charterers under the general terms of the charter party; and we find further that the shipowners will have surrendered the antecedent liability of the charterers without any consideration, since the lien given the shipowners on the cargo after loading is one they had before, we must conclude that the charterers are not relieved from their antecedent liability prior to loading, and as a consequence the libel in this case stated a cause of action, and the demurrer should have been overruled.

The judgment is accordingly reversed, with direction to overrule the demurrer, and that such further proceedings be had as are not inconsistent with this opinion.

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(244 Fed. 710)

ALASKA PACKERS' ASS'N v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. August 20, 1917.)

No. 2927.

1. WORDS AND PHRASES—"WANTON."
The term "wanton" includes all willful acts or conduct which is reckless of the consequences that may ensue therefrom.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Wanton.]

2. INDICTMENT AND INFORMATION ⟹176—WANTON DESTRUCTION OF FISH—PROOF.
Under an indictment under Comp. Laws Territory Alaska 1913, § 266, alleging that on July 30, 1913, defendant unlawfully and wantonly wasted and destroyed salmon taken in the waters of Alaska, the prosecution was not bound to prove the commission of the offense on that day.

3. CRIMINAL LAW ⟹678(3)—ELECTION BETWEEN ACTS.
Under such indictment the fact that the prosecution introduced evidence tending to show that defendant committed the alleged offense of July 26th did not show that the government or the law elected that day as the particular day on which the alleged offense must be proved to have been committed.

4. FISH ⟹15—TIME OF OFFENSE—VARIANCE.
In a prosecution under Comp. Laws Territory Alaska 1913, § 266, for wantonly wasting and destroying salmon taken in the waters of Alaska, alleging the offense to have been committed on July 30, 1913, where the court required the prosecution to elect to prove the offense as of July 28th, and admitted evidence of defendant's acts on other days to prove the offense charged, a conviction will not be reversed because of a variance between the date so elected and that named in the indictment.

5. CRIMINAL LAW ⟹678(4)—WANTON DESTRUCTION OF FISH—EVIDENCE—PRIOR AND SUBSEQUENT ACTS.
Where the court required the prosecution to elect July 28th as the day on which it would claim that the offense was committed, the admission of evidence as to the number of fish taken by defendant's fishermen on July 25th, 26th, and 27th, and defendant's failure to take them away, and the necessary dumping of the fish, and of evidence of the taking of fish on subsequent days extending to a day after July 30, 1913, and of defendant's failure to take them away, in consequence of which they were wasted and destroyed, not to establish a series of distinct crimes, but as bearing on defendant's guilt on July 28th, was not error.

In Error to the District Court of the United States for the Third Division of the Territory of Alaska; Fred M. Brown, Judge.

The Alaska Packers' Association was convicted of wantonly wasting or destroying salmon taken in the waters of Alaska, contrary to section 266 of the Compiled Laws of the Territory of Alaska, and it brings error. Affirmed.

Donohoe & Dimond, of Valdez, Alaska, and Warren Gregory, Allen L. Chickering, George H. Whipple, Evan Williams, and Donald Y. Lamont, all of San Francisco, Cal., for plaintiff in error.

William N. Spence, U. S. Atty., and William A. Munly, Asst. U. S. Atty., both of Valdez, Alaska.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

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ROSS, Circuit Judge. Section 266 of the Compiled Laws of the territory of Alaska provides:

"That it shall be unlawful for any person, company, or corporation wantonly to waste or destroy salmon or other food fishes taken or caught in any of the waters of Alaska."

The preceding section (265) is as follows:

"It shall be unlawful to can or salt for sale for food any salmon more than forty-eight hours after it has been killed."

The plaintiff in error was indicted in the court below for a violation of the first-mentioned section, the indictment alleging that, on the 30th day of July, 1913:

It "unlawfully and wantonly did waste and destroy a large number of salmon, which salmon then and there had been taken and caught in the waters of Alaska, to wit, at a point in the waters of Cook Inlet near the western shore of said Inlet between the mouth of the Kustatan river and the West Foreland in said territory and division, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America."

The jury returned a verdict of guilty as charged in the indictment, upon which verdict judgment against the plaintiff in error was entered.

The specifications of error relied upon in the brief of the plaintiff in error are, in substance, that the trial court erred in denying its motion made at the time of the introduction of the first evidence tending to establish the charge, that the plaintiff then elect a date on which it should attempt to prove the commission of the alleged offense; that the court erred in overruling the defendant's objections to evidence tending to establish the crime alleged on any date other than July 28, 1913, evidence introduced on the part of the government having tended to show the commission of the offense by the defendant on that day; that the court erred in requiring the government, on the close of its evidence, to elect a date as the date on which the alleged crime was committed, for the reason that the 26th day of July, 1913, "had been elected by law as such date, as the 26th day of July, 1913, was the day the witnesses for the plaintiff testified to be the first day on which a large number of salmon were claimed to have been unlawfully and wantonly wasted and destroyed"; and that the court erred in permitting the government, over the defendant's objections, "to elect as the date of the commission of such alleged crime the 28th day of July, 1913, for the reasons stated in the last-preceding assignment of error."

[1] As has been seen, the act made criminal by the statute is to "wantonly" waste or destroy salmon or other food fishes taken or caught in any of the waters of Alaska. The term "wanton" includes all willful acts or conduct which is reckless of the consequences that may ensue therefrom. Strough v. Central R. Co. of New Jersey, 209 Fed. 23, 26, 126 C. C. A. 165; Hazle v. Southern Pacific Co. (C. C.) 173 Fed. 431.

[2, 3] We do not understand it to be contended—certainly it cannot be successfully contended—that the prosecution was bound to prove the commission of the offense on the precise day alleged in the indict-

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ment, which was July 30, 1913, nor can it be properly held as matter of law that because the prosecution introduced evidence tending to show that the defendant committed the alleged offense on the 26th of the same month—four days before the day alleged in the indictment—that either the government or the law "elected" that day as the particular day on which the alleged offense must be proved to have been committed. Manifestly the mere waste or destruction of salmon or other fish on the 26th day of July, or on one or more other succeeding days, might have been far from satisfying the jury that such waste or destruction was wanton.

[4, 5] It appears from the record that testimony was introduced tending to show that at the beginning of the fishing season of 1913 the plaintiff in error contracted with two fishermen, named March and Hunter, for the catching of fish for the appellant's cannery, furnishing them with the necessary boats and fishing tackle, and that pursuant to the arrangement the fishermen built their trap, and that during the run of the king salmon, large numbers of which the fishermen caught, the plaintiff in error sent its boat from time to time to receive them; that after the run of the king salmon was over that of the red salmon commenced on the 24th of July, on which day the fishermen caught 2,500, the same number on the next day, and on the 26th of July about 1,000. The witness March having given testimony tending to show that Hunter went on the 25th of July to notify the plaintiff in error to take the fish, and that its boat did not call for them, was asked what was done with the fish that they had taken on the 24th and 25th of July, to which question objection was made on behalf of the plaintiff in error on the ground of incompetency, irrelevancy, and immateriality, including an objection "to the introduction of any testimony whatever tending to show or establish that salmon were wasted or destroyed at the place named in the indictment on any other date than the date alleged in the indictment, which was the 30th day of July, unless the government at this time elects to announce the date on which they propose to hold" the defendant under the indictment, and on the further ground that no evidence was admissible "tending to establish collateral crimes for the purpose of establishing the crime alleged." The objections were overruled, and exceptions reserved to the ruling, and the witness allowed to state the number of fish taken out by the fishermen on the 25th, 26th, and 27th of July, the failure of the appellant to take them away, the necessary dumping of all the fish taken out by the fishermen prior to the 27th, the coming of the cannery boat of the plaintiff in error on July 28th, at which time the fishermen had 2,000 fresh fish in the scow that had been furnished them by the plaintiff in error. Being asked what was done with those, objection was made on behalf of the plaintiff in error to the effect that no evidence was admissible "of a crime subsequent to the date either alleged in the indictment or fixed by the evidence," in response to which the court said:

"Testimony will be introduced showing the entire operation of this trap as tending to throw light on the charge in this case that on a certain day they were wasted, showing the methods used and the calling of defendant's boat or their not calling as the case may be, and showing the entire circumstances so it can be ascertained whether they did use reasonable diligence and

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care in the protection of these fish, or whether they wantonly and recklessly wasted and permitted them to be destroyed—that is the question here."

And in pursuance of that ruling the prosecution was permitted to give testimony of the catching by the fishermen on various subsequent days extending to a date subsequent to July 30, 1913, of various numbers of fish, of the failure of the plaintiff in error to take them away, and the consequent necessary wasting and destroying of them, not, as the court clearly explained during the taking of the testimony and also to the jury in its instructions, for the purpose of establishing a series of distinct crimes, but only as bearing upon the question as to whether or not the plaintiff in error was guilty of wantonly wasting or destroying the fish on the 28th day of July, 1913, being the day (under the direction of the court) elected by the government's attorney upon the conclusion of its evidence as the day it would claim the crime charged was committed.

Since the indictment charged but the one crime, and since the prosecution was not limited to the precise date named in the indictment, and since the trial court ruled, and instructed the jury, in effect, that the evidence of the transactions on the days other than July 28th was admitted and should be considered solely as bearing on the question as to whether or not the fish were wantonly wasted or destroyed, we are unable to see any sound reason why the judgment should be reversed because of the variance between the date elected by the government's attorney and that named in the indictment and in the verdict of the jury.

The counsel for the plaintiff in error rely upon the case of People v. Flaherty, 162 N. Y. 532, 57 N. E. 73, as being identical in principle with the present one. But we think the case very different. There the defendant had been indicted for the crime of sexual intercourse with a female not his wife, under the age of 16 years, the indictment charging but one offense. The complaining witness testified that the defendant had had sexual intercourse with her on seven different occasions prior to her becoming of the age of 16 years, and at the outset of the trial counsel for the defendant moved that the prosecuting attorney be forced to elect upon which of the seven offenses he would demand a verdict of guilty. The motion was denied, and evidence given in respect to the commission of the offense on the seven different occasions, and it was not until the close of the case of the state that the prosecution made an election. On appeal the court held that the failure of the trial court to force the prosecution to elect at the outset of the trial was error, and accordingly reversed the judgment. The seven different offenses there were seven distinct crimes, whereas in the present case the mere wasting or destruction of fish on either of the occasions inquired about did not constitute a crime unless wantonly committed, and the facts relating to the various occurrences in the present case were admitted for the sole purpose of enabling the jury to correctly determine that question, as the court distinctly instructed them.

The subsequent decision of the Court of Appeals of New York in People v. Thompson, 212 N. Y. 249, 106 N. E. 78, L. R. A. 1915D,

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236, Ann. Cas. 1915D, 162, in which the indictment was based on an alleged violation of the penal law of the state which reads as follows:

"A person who perpetrates an act of sexual intercourse with a female, not his wife, under the age of eighteen years, under circumstances not amounting to rape in the first degree, is guilty of rape in the second degree, and punishable with imprisonment for not more than ten years"

—states the case as follows:

"The female involved gave testimony, under her direct examination as a witness for the prosecution, in proof that the offense charged in the indictment was committed, and additionally, under the overruled objection and exception of the defendant, that subsequent to the commission of it the defendant had sexual intercourse with her four or five times. Because of the reception of this evidence the Appellate Division, as appears from the memorandum opinion there pronounced, reversed the conviction, holding that 'the court erred in admitting testimony as to subsequent offenses by the defendant upon the person of the female involved,' and granted a new trial. We do not agree with the Appellate Division in the view thus taken."

After thus stating the case and its conclusion, the court said:

"It is a general rule that it is error to receive evidence as proof of the offense charged that an accused has committed a criminal offense other than that charged in the indictment. Evidence which tends only to prove collateral facts and has not a natural tendency to establish the fact in controversy should be excluded because: (a) It would have a tendency to withdraw and mislead the attention and deliberation of the jury from the real issue under inquiry; and (b) would subject the accused to charges unconnected with that issue and against which he had no reason to prepare a defense (citing cases). This rule has, however, exceptions in those cases in which the evidence offered has a natural tendency to corroborate or supplement admitted direct evidence (citing cases). And the doctrine is now well, if not universally, established that in prosecutions for adultery, seduction, statutory rape upon one under the age of consent, and incest, acts of sexual intercourse between the parties prior to the offense charged in the indictment may be given in evidence."

And the court there referred to its previous decision in People v. Flaherty, so much relied upon by the plaintiff in error here, in these words:

"It is weightless as to the question under consideration. The error found in it was that the defendant throughout the seven days of the trial was unable to ascertain which of seven offenses testified to by the complainant he was indicted and to be tried for."

In the matter of Election of Counts, it is said in Bishop's New Criminal Procedure, vol. 1 (2d Ed.) § 460, that:

"Where the doings on different days may be regarded as parts of the one transaction, the combined acts on all the days may be shown, and there will be no cause for election"

—citing cases, and, regarding the time to elect, he alludes to the conflict in the decisions upon the subject, and, in conclusion, says in section 462:

"The doctrine of this chapter is less distinct in the books than one could wish; partly because it is difficult to reduce discretion to rule, and partly because judicial opinions on such a subject cannot, in the nature of things, be in complete harmony. It is believed that in most cases justice is best promoted where the judge permits the witnesses to go far enough to identify a transaction before compelling the election. What is chiefly to be avoided,

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while the evidence for the state is being introduced, is to prevent the defendant being prejudiced with the jury by testimony indicating crimes for which he is not indicted, and to which he is not to answer. But whatever is done at the early stages of the trial, plainly, as a general rule, the election should be required before the prisoner opens his defense."

The judgment is affirmed.

(244 Fed. 715)

SCHOENWALD et al. v. BISHOP, U. S. Marshal, et al.

(Circuit Court of Appeals, Ninth Circuit. August 6, 1917. Rehearing Denied October 8, 1917.)

No. 2817.

APPEAL AND ERROR ⟹1010(1), 1023—REVIEW—ACTION TRIED BY COURT.

Where an action is tried by the court without a jury by stipulation under Rev. St. § 649 (Comp. St. 1916, § 1587), the refusal of requests for certain findings is not subject to exception and review; nor is the judgment subject to revision, if supported by the findings and there is material evidence in support of such findings.

In Error to the District Court of the United States for the First Division of the District of Alaska; Robert W. Jennings, Judge.

Action at law by E. Schoenwald and S. T. Hills, as receivers and assignees of the Pacific Coast & Norway Packing Company, against Harry A. Bishop, as United States Marshal, and D. N. McDonald. Judgment for defendants, and plaintiffs bring error. Affirmed.

Replevin. Action to recover possession of the power boat Bernice, held by defendant in error Bishop, as United States marshal, under writ of attachment issued by the United States District Court for the District of Alaska, Division No. 1, in an action by defendant in error McDonald against the assignor of plaintiffs in error. Judgment for defendants. Plaintiffs allege error.

The Pacific Coast & Norway Packing Company is a Minnesota corporation doing business in the state of Washington and the territory of Alaska. In September, 1914, this company became financially embarrassed and was unable to settle its current obligations, although it is alleged its assets were valued largely in excess of its liabilities. On the 16th day of September, 1914, one Roy W. Nevin brought suit against the company in the superior court of King county, Wash., alleging that plaintiff was a creditor of the defendant corporation to the amount of $1,284, and that the corporation was in imminent danger of insolvency, and praying judgment for $1,284, and "for the appointment of a receiver of the property, assets, and business of the defendant, to control and manage the same, and to continue the business of said corporation for the benefit of all its creditors."

The superior court thereupon entered an order appointing E. Schoenwald (plaintiff in error) as receiver of all the property, assets, and business of the defendant in that action, upon his filing an undertaking executed to the state of Washington in the penal sum of $20,000, with a sufficient surety, conditioned for the faithful discharge of his duties in the usual form. It was further ordered that the receiver was empowered to take possession of and to do all things necessary to the preservation of the property and assets of the defendant therein, and to continue the business until the further order of the court. On September 25, 1914, the court appointed S. T. Hills (plaintiff in error) as joint receiver in the same action, and ordered "that the receivers do forthwith take any necessary and proper steps to the end of extending this receivership without delay over the property and assets of the defend-

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ant company located in the territory of Alaska and its business operations therein." On October 26, 1914, the same court made the following order:

"This matter coming on to be heard upon the application of E. Schoenwald and S. T. Hills, as receivers of the Pacific Coast & Norway Packing Company, for an order directing said company, by its duly authorized officers, to convey forthwith to said receivers all its real property in the territory of Alaska, and to transfer to them all personalty there situated, C. O. Steberg, president of said company, being present and consenting to such order, and it appearing to the court that said conveyance and transfer is necessary to the successful conduct of the receivership: It is hereby ordered that the said Pacific Coast & Norway Packing Company convey to said receivers all its title to real estate situated in the territory of Alaska and transfer to said receivers all its personalty there situated, and said C. O. Steberg, as president of said company is hereby directed to execute and deliver to said receivers a sufficient deed to said real estate and a bill of sale of said personalty."

On the same day the Pacific Coast & Norway Packing Company, by C. O. Steberg, its president, and E. Schoenwald, its secretary, executed a conveyance of its real property and a transfer of its personal property, "pursuant to the order of the superior court of the state of Washington in and for King county, this day made and entered in the case of Roy W. Nevin, Plaintiff, v. Pacific Coast & Norway Packing Company, Defendant," to the plaintiffs in error as joint receivers of its property in Alaska, including in the transfer of personal property the power boat Bernice.

On January 25, 1915, D. N. McDonald, one of the defendants in error, commenced an action against the Pacific Coast & Norway Packing Company upon two promissory notes of the latter, which had been delivered before it went into the hands of a receiver for a certain indebtedness accruing in the district of Alaska to McDonald prior to the time of the appointment of either of the receivers mentioned. McDonald had the Bernice attached by H. A. Bishop, United States marshal for the First division of Alaska, and the judgment thereafter rendered in said action provided for the sale of the boat by the marshal to satisfy the judgment for $1,404.89 in favor of McDonald.

On April 28, 1915, plaintiffs in error commenced the present action to recover possession of the Bernice, alleging that the boat was of the value of approximately $2,000, and praying judgment for $500 damages and the costs of suit. Three days after the filing of the complaint herein, the Bernice, her engine, tackle, equipment, machinery, and furniture, were, by virtue of the giving of a bond to defendants by plaintiffs, given and surrendered to plaintiffs as by law provided.

The case was tried by the court before a jury, but the jury was discharged upon agreement at the close of plaintiffs' case, at which time defendants also rested, and both sides demanded judgment. The court thereafter made findings and conclusions of law, and directed that a judgment be entered in favor of the defendants. Plaintiffs allege error in the action of the court in refusing to make certain findings of fact and conclusions of law proposed by plaintiffs, and in making certain other findings of fact and conclusions of law in favor of the defendants. Other facts will be stated in the opinion.

Winfield R. Smith, of Seattle, Wash., and Winn & Burton, of Juneau, Alaska, for plaintiffs in error.

Gunnison & Robertson, of Juneau, Alaska, for defendants in error.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). The plaintiffs in error, to sustain their case as plaintiffs in the court below, first introduced in evidence the record in the case of Nevin v. Pacific Coast & Norway Packing Company in the superior court of King county, Wash. In the complaint in that case it was alleged that the plaintiff was a creditor of the defendant corporation; that the corpo-

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ration at the time the suit was begun was financially embarrassed and could not meet its obligations as they matured; that suits had been begun against it, and, if its property was seized and sold at forced sale, sufficient could not be realized to meet its obligations; that it was in immediate danger of insolvency. The prayer of the complaint was for the appointment of a receiver of the property, assets, and business of the corporation for the benefit of all of its creditors, and for a judgment against the corporation in the amount of $1,284, with costs and disbursements therein. In the answer of the corporation it asked that the complaint be dismissed, and for its costs and disbursements therein.

Upon the complaint being presented to the court, the court entered an order in which it was recited that upon the verified complaint, and after argument of counsel for the plaintiff and for the defendant, it appeared to the court that the defendant was in embarrassed financial circumstances and could not meet its obligations as they matured; that suits had been begun against it, and if its property was seized and sold at forced sale sufficient would not be realized to meet its obligations; and that said defendant, though its assets then exceeded its liabilities, was in immediate danger of insolvency. It was thereupon ordered that E. Schoenwald, of Seattle, King county, Wash., be appointed receiver in the action of all the property, assets, and business of the defendant, upon his filing an undertaking executed in the state of Washington in the penal sum of $20,000, with a sufficient surety, to be approved by the court, conditioned on the faithful discharge of the duties of such receiver; that the receiver was empowered to take possession of and do all things necessary to the preservation of the property and assets of the defendant, and continue the business of said defendant, with the full authority to do all things necessary thereto until the further order of the court, and should from time to time report to the court his doings thereunder; that thereupon Schoenwald qualified and entered upon his duties as receiver; that nine days later the court ordered that S. T. Hills, of Seattle, Wash., be appointed a joint receiver in the action with E. Schoenwald, the then receiver, of all the property, assets, and business of the defendant corporation; that the said Hills thereupon qualified and became a joint receiver with Schoenwald. It was thereupon ordered that the receivers forthwith take any necessary and proper steps to the end of extending their receivership without delay over the property and assets of the defendant corporation located in the territory of Alaska and its business operations therein.

Thereafter, to wit, on the 26th day of October, 1914, the court made an order directing the defendant corporation to convey forthwith to said receivers all its real property in the territory of Alaska, and to transfer to them all personalty therein situated, it appearing to the court that said conveyance and transfer were necessary to the successful conduct of the receivership; that on the same day the defendant corporation executed a bill of sale of the personal property located in the territory of Alaska to Schoenwald and Hills as receivers of the corporation, "and not otherwise," in which bill of sale it was recited that it was made "pursuant to the order of the superior court of the

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state of Washington in and for King county, this day made and entered in the case of Roy W. Nevin, Plaintiff, v. Pacific Coast & Norway Packing Company, Defendant." This bill of sale included the power boat Bernice heretofore mentioned.

Had the plaintiffs rested their case upon this record, it would have appeared beyond any question that the right of the plaintiff to the possession of the power seine boat Bernice was based solely upon the assignment ordered by the superior court of King county, Wash., and the transfer executed by the Pacific Coast & Norway Packing Company, pursuant to that order, and that their rights as receivers were such as they had under the order of the court, "and not otherwise."

After the plaintiffs had introduced this record, they undertook to show by oral testimony that the assignment was a voluntary common-law assignment, and that the transfer was of the same character. There is the question whether this oral testimony was admissible to contradict, explain, or control the evidence furnished by the record of the proceedings in the state court; and there is also the further question whether, if the transaction should be held upon that evidence to be a voluntary common-law assignment and transfer, it would be given effect in Alaska as against the rights of the defendant, a local creditor in that territory.

But we pass these two questions (stating them only to mention the fact that they exist and that the latter has been elaborately discussed in the briefs) to consider the preliminary question whether upon this record we have any authority to review the judgment in this case. By stipulation of counsel a jury was waived, and the cause submitted to the court without a jury. The findings made by the court are in the nature of special findings—the court finding, among other things, in substance, that the instrument in writing purporting to transfer the property and assets of the corporation (including the power seine boat Bernice) showed on its face to be and was in fact executed pursuant to the order of the superior court of the state of Washington in and for King county; that the said Pacific Coast & Norway Packing Company had not by any action of its governing board transferred or assigned its property to Schoenwald and Hills, the plaintiffs in that case, in any capacity or at all, nor had it ratified or acquiesced in any such assignment or in the receivership proceedings.

Upon these special findings the court concluded that the assignment to and the receivership of Schoenwald and Hills were in invitum proceedings, and that both were in conflict with the rights of the defendant McDonald, a local creditor, and were against public policy, and had no extraterritorial effect, and should not be enforced in the territory of Alaska. The limitation to our authority in such a case has been clearly stated by the Supreme Court in Dooley v. Pease, 180 U. S. 126, 131, 21 Sup. Ct. 329, 331 (45 L. Ed. 457), as follows:

"Errors alleged in the findings of the court are not subject to revision by the Circuit Court of Appeals, or by this court, if there was any evidence upon which such findings could be made. Hathaway v. National Bank, 134 U. S. 498 [10 Sup. Ct. 608, 33 L. Ed. 1004]; St. Louis v. Retz [Rutz] 138 U. S. 241 [11 Sup. Ct. 337, 34 L. Ed. 941]; Runkle v. Burnham, 153 U. S. 225 [14 Sup. Ct. 837, 38 L. Ed. 694]."

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The plaintiffs submitted to the court requests to find certain facts in favor of the plaintiffs. These requests were refused. "They are no more the subject of exception and review than would be a request to a jury to find in a particular manner, and a refusal by the jury so to find." Dickinson v. Planters' Bank, 83 U. S. (16 Wall.) 250, 258, 21 L. Ed. 278. In the recent case of United States v. Fidelity & Guaranty Co., 236 U. S. 512, 35 Sup. Ct. 298, 59 L. Ed. 696, the Supreme Court, referring to matters in evidence, but not in the findings, on page 527 of 236 U. S., on page 302 of 35 Sup. Ct. (59 L. Ed. 696), said:

"Assuming these defences were properly pleaded, we still need spend no time upon them, since the argument made here to support them is based, not upon the findings, but upon a general review of the evidence and a series of inferences drawn from it that are inconsistent with the facts as found by the trial court. The findings have the same effect as the verdict of a jury, and this court does not revise them, but merely determines whether they support the judgment. Rev. Stat. §§ 649, 700, 1011 (amended by Act Feb. 18, 1875, c. 80, § 1, 18 Stat. 318 [Comp. St. 1913, §§ 1587, 1668, 1672]); Norris v. Jackson, 9 Wall. 125, 128 [19 L. Ed. 608]; St. Louis v. Ferry Co., 11 Wall. 423, 428 [20 L. Ed. 192]; Dickinson v. Planters' Bank, 16 Wall. 250, 257 [21 L. Ed. 278]; Insurance Co. v. Folsom, 18 Wall. 237, 248 [21 L. Ed. 827]; British Queen Mining Co. v. Baker Silver Mining Co., 139 U. S. 222 [11 Sup. Ct. 523, 35 L. Ed. 147]."

As there is evidence to support the findings, and the findings support the judgment, there is nothing in this record for this court to review. The judgment is accordingly affirmed.

(244 Fed. 719)

ZEITINGER et al. v. HARGADINE-McKITTRICK DRY GOODS CO.

(Circuit Court of Appeals, Eighth Circuit. July 21, 1917.)

No. 4900.

BANKRUPTCY ⟹49—CORPORATIONS—INTERVENTION BY STOCKHOLDERS.

A court of bankruptcy cannot be compelled to exercise its jurisdiction in aid of a fraud, and has power to permit the intervention of stockholders to contest a voluntary petition filed on behalf of the corporation by its officers and directors, upon a showing that the object of the proceeding was to avoid the effect of a judgment obtained by stockholders against the corporation and directors for the appointment of a receiver for the corporation, and for an accounting by the directors for fraudulent mismanagement.

Appeal from the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

In the matter of the Hargadine-McKittrick Dry Goods Company, voluntary petitioner in bankruptcy. Christian J. Zeitinger and others appeal from an order of adjudication and an order denying their right to intervene. Reversed.

For opinion below, see 239 Fed. 155.

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Randolph Laughlin and Matt G. Reynolds, both of St. Louis, Mo. (Julian Laughlin and Chase Morsey, both of St. Louis, Mo., on the brief), for appellants.

Charles A. Houts, of St. Louis, Mo., for appellee.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

CARLAND, Circuit Judge. This is an appeal from a decree, entered February 6, 1917, adjudicating appellee a bankrupt on its voluntary petition, and also from an order denying to appellants the right to intervene in said proceeding.

The appellee was first adjudicated a bankrupt on January 6, 1917, on its voluntary petition, and a receiver of its property appointed. Subsequently, on the same day, the order of adjudication and the order appointing a receiver were vacated, and a hearing ordered on the voluntary petition for January 13, 1917. On January 6, 1917, the board of directors of appellee adopted a resolution authorizing and directing the president and secretary of appellee, or either of them, to execute on behalf of the corporation an instrument in writing, admitting the inability of said company to pay its debts and its willingness to be adjudged a bankrupt on that ground, and authorizing the president and secretary, or either of them, to take such immediate steps on behalf of said corporation as would be appropriate to have the same adjudged a bankrupt and a receiver appointed to take charge of its assets. On the same day the voluntary petition in bankruptcy of appellee was prepared, signed, and filed; the same being signed by Martin P. Donahoe, president. Schedule A attached to the petition named the following creditors:

Suit by George H. Allan, of St. Louis, Mo., for shares of profits on the manufacture and sale of bags	$ 30,000.00
Guaranty to Missouri Pacific Railroad Co. on account of its lease on Pontiac Building. Matured claim January 1, 1917	118,577.45
Unmatured claim on the same lease	343,000.00
Salaries due workmen, clerks, or servants for month of January	820.00
Total	$492,397.45

Schedule B showed assets of the value of $300,959.96, one item of which was: Deposits of money in banks and elsewhere, $196,176.73. At the hearing on January 13, 1917, appellants, being stockholders of appellee, presented to the court for filing a petition in intervention, setting forth the petition, findings of fact, conclusions of law, and decree of the circuit court of the city of St. Louis, Mo., in an action commenced in December, 1915, wherein the intervening petitioners were plaintiffs and the appellee and its board of directors were defendants.

It appeared, from the intervening petition and duly certified copies of the record of the suit in the circuit court, that the intervening petitioners, as stockholders of appellee, had commenced an action in said circuit court in December, 1915, against appellee and its board of directors, the general nature and purpose of which was to take from the possession and control of the board of directors all of the assets of appellee of every nature and kind, and to secure an account-

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ing against the members of the board of directors for loss, waste, and damage caused by their fraudulent mismanagement of the affairs of the corporation; that appellee was a necessary party to said action in the circuit court, and appeared therein and filed its answer, as also did the board of directors; that upon the assurance by the defendants in the action in the circuit court that the status quo of appellee and its assets would be maintained, and that the same would not be disposed of until the case was finally determined and judgment entered, no temporary injunction was granted or a receiver appointed at the commencement of the action; that the case in the circuit court was finally brought to trial, the trial thereof continuing over a period of four weeks. At the end of the trial the case was taken under advisement, and was held until December 29, 1916, when the court announced its decision to the effect that it would grant an accounting and appoint a receiver, and at the same time fixed the bond of the receiver at $500,000.

Appellee and the board of directors contested the suit in the circuit court at every step. On the day the decision was announced, counsel for the plaintiffs were asked to prepare a decree and submit the same to opposing counsel; the court stating that, if counsel could not agree upon the terms thereof, the court would settle same. On January 5, 1917, the decree was prepared and copies furnished to counsel for the directors and appellee. The circuit court on January 8, 1917, formally entered its judgment and decree, which had been informally announced on December 29, 1916. A receiver was appointed and took possession of all the assets of appellee, in the possession of the board of directors and what is known as the executive committee, and ever since has held the possession of said property subject to the order of the circuit court. It appeared, from the findings of fact, conclusions of law, and decree of the circuit court set forth in the record, that the circuit court adjudged that the board of directors had wasted, misappropriated, and lost the assets of the corporation in many ways, in sums aggregating millions of dollars, for which misappropriation and losses said directors were held accountable and liable, including Martin P. Donahoe, who signed the voluntary petition in bankruptcy as president of appellee; that George H. Allan, who appears in Schedule A as a creditor of appellee, was a defendant in the suit in the circuit court, and was there held accountable in a sum many times in excess of the amount of his claim. It was also adjudicated by the decree of the circuit court that the guaranty of appellee to the Missouri Pacific Company was ultra vires and void, and a fraud upon appellee and its stockholders, and that at the time the petition was filed in that court the directors of appellee had in their possession assets of the actual and potential value of $3,198,000. The circuit court by its decree referred the matters which required an accounting to a referee for report.

The intervening petitioners claimed that to allow appellee to file a voluntary petition and be adjudicated a bankrupt, in the face of this record, would result in the commission of a fraud upon the petitioners in intervention and plaintiffs in the suit in the circuit court, as well as upon the circuit court and the United States District Court,

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in which the voluntary petition in bankruptcy was presented; that it was clearly manifest that the only purpose of filing the voluntary petition was to bring about the appointment of a trustee in bankruptcy, who would necessarily be controlled and appointed by the creditors of appellee, if any, in the interest of the directors and other persons who were held liable in the action in the circuit court, and thereby the whole proceedings and judgment in the circuit court would be paralyzed and rendered abortive. The District Judge, in passing upon the right of the interveners to intervene in the voluntary bankruptcy proceeding, said:

"In view of all the facts brought to its attention, this court cannot regard this case otherwise than as an effort on the part of the officers and directors of the bankrupt company to evade the process of the circuit court of the city of St. Louis, and to escape the performance of its decree. No creditor of the bankrupt company seems to feel any concern about the collection of his debt, and the moving parties in the present bankruptcy proceedings are the officers and directors of the company. These are the same persons who by the judgment of the circuit court of the city of St. Louis have been held liable to the company or its stockholders for a large sum of money."

Notwithstanding these views, the District Court denied the right of the interveners to file their petition in intervention and granted an adjudication on the voluntary petition of appellee. The District Court seemed to be of the opinion that it was helpless to prevent what was apparently a fraud on its own jurisdiction, that of the circuit court, and upon interveners, because it was of the opinion that no defense could be made to the voluntary petition in bankruptcy. But the case made by the intervening petition and the exhibits attached thereto was of a broader signification than a mere litigation of the truth of the allegations in the voluntary petition.

The showing made by the interveners did tend to show that the two main creditors named in the voluntary petition were not creditors at all, so that on the face of the record there were only left in Schedule A the salaries to become due for the month of January, 1917, to the clerks and employés of appellee, amounting in all to $820, and as against this Schedule B showed a cash item of $196,000. These facts, however, were brought forward for the purpose of showing that the whole proceeding was fraudulent. There are expressions in the decisions of the courts to the effect that the allegations of a voluntary petition are not issuable; for instance, in Hanover National Bank v. Moyses, 186 U. S. 181, 22 Sup. Ct. 857, 46 L. Ed. 1113, the contention was made that to allow the filing of a voluntary petition in bankruptcy without giving notice to any creditor rendered the law unconstitutional, in that it deprived creditors of their property without due process of law. The Supreme Court, in deciding this contention was not sound, used the following language with reference to the allegations of the voluntary petition in bankruptcy:

"These are not issuable facts, and notice is unnecessary, unless dismissal is sought when notice is required. Section 59g [Comp. St. 1916, § 9643]."

The District Court, however, could have safely relied upon the proposition that there is and can be no law or practice which would compel a court of bankruptcy or any other court to become a party

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to a fraud. The bankruptcy law provides that upon the filing of a voluntary petition the judge shall hear the petition and make the adjudication, or dismiss the petition. As was said by this court in Ogden v. Gilt Edge Mines Co., 225 Fed. 723, 140 C. C. A. 597:

"Bankruptcy proceedings are in the nature of proceedings in equity, and bankruptcy courts administer the law according to the spirit of equity. Bardes v. Hawarden Bank, 178 U. S. 524, 535, 20 Sup. Ct. 1000, 44 L. Ed. 1175; Lockman v. Lang, 132 Fed. 1, 6, 65 C. C. A. 621; Id., 128 Fed. 279, 62 C. C. A. 550, 555; In re Broadway Savings Trust Co., 152 Fed. 152, 81 C. C. A. 58. That stockholders of a corporation may, in equity, either sue for or defend on behalf of the corporation, if the directors fraudulently fail to do so, or where they are the beneficiaries of the action, is a well-recognized principle of equity jurisprudence. Hawes v. Oakland, 104 U. S. 450, 26 L. Ed. 827; Bronson v. La Crosse R. Co., 2 Wall. 283, 17 L. Ed. 725; In re Swofford Bros. D G. Co. (D. C.) 180 Fed. 549, 553."

The District Judge, in adjudicating upon a voluntary petition in bankruptcy, is not a ministerial, but a judicial, officer, whose first duty is to see that those who minister in the temple of justice shall not invoke his authority for the accomplishment of fraud. We are of the opinion that the allegations of the petition in intervention are clearly proved by the exemplified copy of the record of the suit in the circuit court, and that it was the clear duty of the District Court, as well as of this court, in order to prevent the perpetration of what clearly would be a fraud upon the circuit court, the court of bankruptcy, and the interveners, to dismiss the voluntary petition of appellee.

The order of adjudication and the order refusing the right to file the petition in intervention are reversed, and the case is remanded, with directions to the District Court to allow the intervening petition and exhibits to be filed, and, upon the same being filed, that an order be entered dismissing the voluntary petition in bankruptcy.

The petition to revise, No. 185, Original, is dismissed.

(244 Fed. 723)

INTERNATIONAL COTTON MILLS v. PERNOD.

(Circuit Court of Appeals, First Circuit. September 22, 1916.)

No. 1182.

1. MASTER AND SERVANT ⟹204(1)—MASTER'S LIABILITY FOR INJURY TO SERVANT—NEW HAMPSHIRE STATUTE.

Under Employers' Liability Act N. H. (Laws 1911, c. 163) § 2, which makes an employer liable for injury to a workman through his negligence, or that of his agents or servants, or by reason of defects in plant, ways, works, or machinery due to such negligence, and provides that "the workman shall not be held to have assumed the risk of any injury due to any cause specified in this section," the right of recovery is still conditioned on proof of want of reasonable care on the part of the master or his employés, and the assumption of risk clause is applicable only where such negligence is shown.

2. MASTER AND SERVANT ⟹107(5)—MASTER'S LIABILITY FOR INJURY TO SERVANT.

The duty of a master to exercise care depends upon the reasonable apprehension of danger, and he may rely upon the exercise by his servants

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of ordinary care to avoid such dangers as are properly incidental to the work. He is not obliged to keep the place safe at every moment, so far as such safety depends on the due performance of the work by the servant himself.

3. MASTER AND SERVANT ⟹107(8)—MASTER'S LIABILITY FOR INJURY TO SERVANT—UNSAFE PLACE TO WORK—"DEFECT IN WAY."

Plaintiff, an employé in defendant's cotton mill, was engaged in moving a large roll of cloth from a low bench upon a truck. Iron shells or cores three inches in diameter were passed through the center of the rolls in handling. The roll which plaintiff was moving started to roll off the bench, and in moving quickly he stepped upon a core lying in the passageway and was injured. The bench stood beside a passageway 30 inches wide, and it was customary for the workman, after using a core, to leave it on the floor, to be convenient when again wanted. Plaintiff saw this core, and had previously moved it with his foot. *Held*, that the presence of the core in the passageway, where it had been temporarily left by a workman, and which was known to plaintiff, did not constitute a "defect in the way," within the meaning of the statute, or charge defendant with negligence which was the cause of plaintiff's injury.

In Error to the District Court of the United States for the District of New Hampshire; Edgar Aldrich, Judge.

Action at law by Emiel Pernod against the International Cotton Mills. Judgment for plaintiff, and defendant brings error. Reversed.

Edward C. Stone, of Boston, Mass. (Sawyer, Hardy, Stone & Morrison, of Boston, Mass., on the brief), for plaintiff in error.

Henry B. Stearns and Hiram A. Stearns, both of Manchester, N. H., for defendant in error.

Before PUTNAM and DODGE, Circuit Judges, and BROWN, District Judge.

BROWN, District Judge. This is a writ of error for review of the rulings of the District Court in an action for negligence.

The plaintiff below was moving a large and heavy roll of cloth from a low bench, 14 inches in height, to a truck, 7 feet long, provided at each end with a standard, 23 inches in height, to receive the ends of the core about which the cloth was rolled. The diameter of the roll was about 28 inches; of the core, 3 inches. The top of the standard was, therefore, at a lower level than the lower surface of the end of the core which was to rest upon it. The transfer of the roll, therefore, did not involve raising the roll, but only guidance of the core of the roll into a standard at a lower level.

The plaintiff had fixed one end of the core on its standard, while the whole weight of the roll was supported by the bench, and was about to swing the other end of the roll, and to drop and guide it to its standard. Evidence as to the weight of the roll affords slight indication of the amount of exertion required of the workman in making the transfer.

The plaintiff testified that before he was in a position to handle the roll it started of its own accord and rolled off. He was off his balance when it rolled, and started to catch himself by moving his right foot forward, and stepped on a core, which rolled. His injury was a strain.

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It was contended by the plaintiff that the core upon which he stepped was under his feet through the negligence of the master in permitting a passageway, 30 inches wide, to be obstructed by the presence of cores, and that this was a defect or insufficiency in the ways due to the negligence of the defendant or its employés.

[1] The plaintiff testified that he knew of the presence of some cores in the aisle or passageway, and that he pushed them back with his heel just before the accident. It is contended, however, that the defense of assumption of risk is inapplicable because of the New Hampshire statute (Laws N. H. 1911, c. 163, §§ 1, 2):

"Section 1. This act shall apply only to workmen engaged in manual or mechanical labor in the employments described in this section: * * * (b) Work in any shop, mill, factory or other place, on, in connection with or in proximity to any hoisting apparatus, or any machinery propelled or operated by steam or other mechanical power in which shop, mill, factory, or other place, five or more persons are engaged in manual or mechanical labor. * * *

"Sec. 2. If, in the course of any of the employments above described, personal injury by accident arising out of and in the course of the employment is caused to any workman employed therein, in whole or in part, * * * by the negligence of the employer, or any of his or its officers, agents, or employés, or by reason of any defect or insufficiency due to his, its or their negligence in the condition of his or its plant, ways, works, machinery, * * * equipment, or appliances, then such employer shall be liable to such workman for all damages occasioned to him. * * * The workman shall not be held to have assumed the risk of any injury due to any cause specified in this section; but there shall be no liability under this section for any injury to which it shall be made to appear by a preponderance of evidence that the negligence of the plaintiff contributed."

Under this statute the defense of assumption of risk is abolished only in cases where the injury is attributable to negligence, and the liability of the master is still conditioned upon negligence. Seaboard Air Line Co. v. Horton, 233 U. S. 492, 501, 502, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475. His responsibility is still limited to the exercise of reasonable care by himself and his employés. In Labatt's Master and Servant, vol. 2, § 666, it is said of a similar act:

"So far as regards the character of the actual physical conditions which warrant the inference of culpability on the part of the immediate actor, whether he be the master himself or an employé, the evidential prerequisites to establishing a right to indemnity are essentially the same under the statutes as at common law."

[2] In considering whether there has been a failure to exercise reasonable care, we cannot ignore the fact that the duty to exercise care depends upon the reasonable apprehension of danger, and that the master may rely upon the exercise by his servants of ordinary care to avoid such dangers as are properly incidental to the work. The master is not obliged to keep the place safe at every moment, so far as such safety depends on the due performance of the work by the servant himself. Kreigh v. Westinghouse & Co., 214 U. S. 249, 256, 29 Sup. Ct. 619, 53 L. Ed. 984.

The risk of injury from his own failure to exercise such ordinary care as is necessary to avoid an obvious danger arising in the prog-

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ress of the work is a risk still assumed by the employé; for the master cannot be held negligent merely because the work involves danger unless the servant takes precautions which any intelligent man would see to be appropriate under the circumstances.

[3] The evidence failed to show any defect in the permanent fixtures or arrangement of the working place. The passageway, or aisle, was 30 inches in width, and the benches forming the aisle but 14 inches high. The cores, which were iron shells 6½ feet long, 3 inches in diameter, and weighing about 40 pounds, were appliances in use in handling the rolls, and in the course of the work were put into and taken out of the rolls. When taken out, it was usual to put them between the benches in the aisle. As they were heavy, it was convenient to the work to have them near at hand for use.

The temporary disposition of these cores in the aisle was not proved to have been unnecessary or improper, having regard to the work in hand. On the contrary, the only witness, a witness called by the plaintiff, who gave testimony relating to this subject, testified that this was the handiest place for them. Furthermore, they were movable: and in fact just before the accident the plaintiff did move one of them by kicking it. Their presence was known, they could be moved to such extent as was necessary to secure proper standing room, and there was no evidence to show that the plaintiff, by the exercise of ordinary care, could not have given himself ample standing room for his work, or that any urgency of the work prevented him from doing so.

The case, therefore, differs essentially from one in which there is some unreasonable and unnecessary obstruction, having no proper relation to the work, and falls within that class of cases which hold that those conditions which, in all kinds of industrial work are temporarily created by the user of the appliances furnished by the master, are not considered to be caused by "defects," within the meaning of the statute. Labatt's Master and Servant, vol. 2, § 675.

Assuming that the plaintiff was properly found by the jury not to be guilty of contributory negligence, the injury must then be regarded as due to accident rather than to the master's negligence.

The plaintiff also claimed negligence in respect to the condition of the movable standard of the truck, and of an iron pipe handle, so called; but there is an entire failure of evidence to show that the roll fell on account of either of these alleged defects.

There was nothing to justify a finding that the fall of the roll was due to the defendant's negligence, nor, so far as appears from the charge, was the case submitted to the jury on that issue.

We are of the opinion that upon all the evidence the plaintiff was not entitled to recover, and that the refusal of the defendant's request to so charge was error.

The judgment of the District Court is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion, and the plaintiff in error recovers costs in this court.

PUTNAM, Circuit Judge. I concur in the result. Two requests were made by the defendant in the court below that a verdict be di-

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rected for the defendant on the entire record. The first request was waived by subsequent proceedings; but the second request should have been granted. A careful reading of the record shows that the case was tried on an allegation of negligence on the part of the defendant below; but while, under the New Hampshire statute, the assumption of risk on the part of the plaintiff might have been in issue, it was not. It is true that the dangerous element at the outset was the cores lying on the floor; but the plaintiff did not permit them to remain as the defendant left them, but, as the record says, "brushed them aside with his foot, and then went along with his work." The causa causans was the rolls in the positions to which the plaintiff below had removed them. There was no evidence that the accident occurred by reason of the rolls being in the location where the defendant below had left them, while the removal of the rolls from the position in which the defendant left them was in no way in the eyes of the law connected with what the defendant below did or omitted to do, but was separated from what the defendant did or omitted to do by intelligent action on the part of the plaintiff below, which in no way arose out of or was connected with what the defendant below has done, and was wholly independent thereof in the eyes of the law. Consequently, the record contained no evidence showing that what the defendant below did was the causa causans, but, on the other hand, showed the reverse.

The verdict should therefore, as matter of law, have been directed for the defendant below under its second motion.

(244 Fed. 727)

UNITED STATES v. GULLIKSEN.

(Circuit Court of Appeals, Eighth Circuit. June 9, 1917.)

No. 4456.

ALIENS ⟹71½, New. vol. 7 Key-No. Series—NATURALIZATION—CANCELLATION OF CERTIFICATE—GROUNDS.

Act June 29, 1906, c. 3592, § 4, 34 Stat. 596 (Comp. St. 1916, § 4352), provides that the petition for naturalization shall be verified by the affidavits of at least two credible witnesses, who shall state in their affidavits that they have personally known the applicant to be a resident of the United States for at least five years continuously, and that they have personal knowledge that he is of good moral character and qualified to be admitted as a citizen. Section 5 (Comp. St. 1916, § 4353) provides that the clerk shall, if requested, issue a subpœna for the witnesses named by the applicant, but that, in case such witnesses cannot be produced upon the final hearing, other witnesses may be summoned. *Held* that, where one of the witnesses verifying a petition of naturalization testified on the hearing that he had not known the applicant for five years, the substitution in his place of another witness, whose affidavit was not attached to the petition at the time of its filing, was such a departure from the law as caused the certificate of naturalization to be illegally procured and subject to cancellation.

Appeal from the District Court of the United States for the District of Wyoming; John A. Riner, Judge.

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Suit by the United States against Andrew Gulliksen. From a judgment dismissing the complaint, the United States appeals. Reversed and remanded, with directions.

David J. Howell, Asst. U. S. Atty., of Cheyenne, Wyo. (Charles L. Rigdon, U. S. Atty., of Cheyenne, Wyo., on the brief), for the United States.

Clyde M. Watts, of Cheyenne, Wyo., for appellee.

Before CARLAND, Circuit Judge, and AMIDON and VAN VALKENBURGH, District Judges.

CARLAND, Circuit Judge. This is an appeal from a judgment dismissing on motion the following complaint filed by the United States, for the reason that it did not state a cause of action:

"(1) That on the 15th day of April, 1914, the said defendant, Andrew Gulliksen, being then an alien, filed in the District Court of the United States in and for the District of Wyoming, his petition to be admitted as a citizen of the United States under the provisions of the act of Congress of June 29, 1906, providing for the naturalization of aliens.

"(2) That upon the 1st day of October, 1914, the petition of the said Andrew Gulliksen came on for hearing in said court, and it was thereupon ordered by said court that the said Andrew Gulliksen, defendant aforesaid, be admitted as a citizen of the United States, and a certificate of naturalization, under the seal of said court, was thereupon issued to the said Andrew Gulliksen, and ever since said time the said defendant has claimed and now claims, by virtue of said certificate of naturalization, to be a citizen of the United States.

"(3) That said certificate of naturalization was illegally issued and procured by the said Andrew Gulliksen, and that said court had no jurisdiction to issue a certificate of naturalization to the said Andrew Gulliksen, for the reason that the said petition for naturalization filed by the said Andrew Gulliksen aforesaid was not verified by the affidavits of two credible witnesses who had personally known the said applicant for citizenship, to wit, the said Andrew Gulliksen, to be a resident of the United States for a period of at least five years continuously immediately preceding the date of the filing of his said petition for naturalization.

"That at the time of the filing of said petition for naturalization by defendant as aforesaid said petition was verified by the affidavits of two witnesses, to wit, Charles Warren and F. A. Roedel; that said Charles Warren, in said affidavit, verifying said petition for naturalization, deposed and said: that he had personally known Andrew Gulliksen, the petitioner above mentioned, to have resided in the United States continuously immediately preceding the date of the filing of his petition since the 1st day of December, A. D. 1908.

"That said affidavit of the said Charles Warren is false and untrue, in this: That the said Charles Warren did not personally know the said Andrew Gulliksen to have resided in the United States continuously immediately preceding the date of the filing of his petition for naturalization since the 1st day of December, A. D. 1908, but in truth and in fact the said Charles Warren had known the applicant, the said Andrew Gulliksen, only since the month of September, 1909, and did not know the said Andrew Gulliksen to have resided in the United States prior to the month of September, 1909; and that the said Charles Warren had not known the said Andrew Gulliksen to be a resident of the United States for a period of at least five years continuously immediately preceding the date of the filing of his said petition for naturalization.

"That thereafter the said Charles Warren appeared at the final hearing upon the petition of the said applicant for naturalization as a witness for said applicant, and testified that he did not know said applicant before the month of September, 1909, and had not known the said Andrew Gulliksen since the

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1st day of December, A. D. 1908, and had not known the said Andrew Gulliksen for a period of five years immediately preceding the date of the filing of his application for naturalization.

"That thereupon the court, finding the said Charles Warren not a competent witness, permitted the said petitioner, the said Andrew Gulliksen, to procure and use, in the place of the said Charles Warren, Gullik Gulliksen, who testified that he knew the said Andrew Gulliksen to be a citizen of the United States for a period of five years continuously immediately preceding the date of the filing of the petition of the said Andrew Gulliksen for naturalization. That the said Gullik Gulliksen was not a witness whose affidavit had been attached to the petition of the said Andrew Gulliksen at the time of the filing of the same or at any time.

"That the affidavit of the said Charles Warren, attached to and filed with the petition of the said applicant for naturalization as aforesaid, was not the affidavit of a credible witness who had known said applicant for a period of at least five years immediately preceding the date of the filing of said petition.

"Wherefore plaintiff prays that this court make an order setting aside and canceling said certificate of naturalization and citizenship issued to the said Andrew Gulliksen, defendant aforesaid, on the 1st day of October, 1914, and directing the clerk of this court to transmit a certified copy of such order to the Division of Naturalization of the Bureau of Immigration of Naturalization, Washington, D. C."

Paragraph 3 of subdivision 2 of section 4 of the act of June 29, 1906, reads as follows:

"The petition shall also be verified by the affidavits of at least two credible witnesses, who are citizens of the United States, and who shall state in their affidavits that they have personally known the applicant to be a resident of the United States for a period of at least five years continuously, and of the state, territory, or district in which the application is made for a period of at least one year immediately preceding the date of the filing of his petition, and that they each have personal knowledge that the petitioner is a person of good moral character, and that he is in every way qualified, in their opinion, to be admitted as a citizen of the United States."

Section 5 of the same act reads as follows:

"That the clerk of the court shall, immediately after filing the petition, give notice thereof by posting in a public and conspicuous place in his office, or in the building in which his office is situated, under an appropriate heading, the name, nativity, and residence of the alien, the date and place of his arrival in the United States, and the date, as nearly as may be, for the final hearing of his petition, and the names of the witnesses whom the applicant expects to summon in his behalf; and the clerk shall, if the applicant requests it, issue a subpoena for the witnesses so named by the said applicant to appear upon the day set for the final hearing, but in case such witnesses cannot be produced upon the final hearing other witnesses may be summoned."

The appeal was argued and submitted at a former term of the court and a decision postponed until the Supreme Court should decide certain questions certified by this court in the case of the United States v. Solomon Louis Ginsberg, 243 U. S. 472, 37 Sup. Ct. 422, 61 L. Ed. 853. On the 9th of April, 1917, the last-named case was decided, and it was there held that a certificate of citizenship may be set aside and canceled in an independent suit brought under section 15 of the act of June 29, 1906 (Comp. St. 1916, § 4374), and that the presentation of a petition for naturalization on final hearing in open court and the hearing thereof subsequently passed to and finally held in the chambers of the judge adjoining the courtroom, on a subse-

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quent day and at an hour earlier than that to which the court had been regularly adjourned, was not a hearing in open court as required by section 9 of said act (Comp. St. 1916, § 4368). It was further said:

"An alien who seeks political rights as a member of this nation can rightfully obtain them only upon terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare. * * * No alien has the slightest right to naturalization unless all statutory requirements are complied with; and every certificate of citizenship must be treated as granted upon condition that the government may challenge it, as provided in section 15, and demand its cancellation unless issued in accordance with such requirements. If procured when prescribed qualifications have no existence in fact, it is illegally procured; a manifest mistake by the judge cannot supply these nor render their existence nonessential."

We think, in view of the above language and decision, that we must hold that the substitution of the witness Gulliksen in place of the witness Charles Warren under the circumstances detailed in the complaint was such a departure from the requirements of the law as to cause the certificate of naturalization which resulted to be illegally procured. United States of America v. Ginsberg (April 9, 1917) 243 U. S. 472, 37 Sup. Ct. 422, 61 L. Ed. 853; In re Aprea (C. C.) 158 Fed. 702; In re Welsh et al. (C. C.) 159 Fed. 1014; In re Wolf (D. C.) 188 Fed. 519; United States v. Martorana, 171 Fed. 397, 96 C. C. A. 353.

The judgment below, therefore, is reversed, and the case remanded, with directions to overrule the motion to dismiss and allow the defendant to answer the complaint, if he shall be so advised.

(244 Fed. 730)

MEYER v. PACIFIC MACHINERY CO.

(Circuit Court of Appeals, Ninth Circuit. August 6, 1917.)

No. 2928.

1. SALES ⟹479(7)—CONDITIONAL SALE—EVIDENCE.
   In an action for the possession of sawmill machinery claimed to have been delivered to defendant's predecessor in interest under a conditional contract of sale, with retention of title until paid for, evidence *held* to sustain a finding that the machinery was delivered under a contract reserving title.
2. SALES ⟹473(1)—CONDITIONAL SALE—RESALE—BONA FIDE PURCHASER.
   Where machinery sold under a contract of conditional sale was sold by the buyer's assignee for the benefit of creditors, a purchase by the cashier of a national bank made for the bank on account of its claim against the buyer lacked the essential elements of a bona fide purchase for value.
3. SALES ⟹477(1)—CONDITIONAL SALE—TITLE TO PROPERTY—WAIVER AND ESTOPPEL.
   Where the seller of machinery under a contract of conditional sale wrote a letter to the buyer stating that its lien was based on the theory that the buyer's refusal to give a machinery contract which could be filed under the registry law would not deprive it of the security which it would have lost had it failed to file such contract, and thereafter brought an unsuccessful suit in equity against the buyer claiming an equitable lien by

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reason of the buyer's failure to comply with its conditional sale contract, the letter and the suit did not waive the seller's claim of title to the property or estop it from asserting it, where there was no proof that the buyer had changed its position or in any way acted thereon.

4. FIXTURES ⟹22—CONDITIONAL SALE—MILL MACHINERY—"FIXTURE."

Mill machinery attached only by bolts and screws, and which could be removed without injury to the mill, was not a fixture within L. O. L. § 7414, which could not be removed.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Fixture.]

In Error to the District Court of the United States for the District of Oregon; Charles E. Wolverton, Judge.

Action by the Pacific Machinery Company against F. T. Meyer. Judgment for plaintiff, and defendant brings error. Affirmed.

Dolph, Mallory, Simon & Gearin and Hall S. Lusk, all of Portland, Or., and C. D. Latourette, of Oregon City, Or., for plaintiff in error.

Ira Bronson, J. S. Robinson, and H. B. Jones, all of Seattle, Wash., for defendant in error.

Before GILBERT and HUNT, Circuit Judges, and DIETRICH, District Judge.

GILBERT, Circuit Judge. The defendant in error was the plaintiff in the court below in an action to recover the possession of certain sawmill machinery, claiming that the same was delivered to the Oregon City Lumber & Manufacturing Company, the predecessor in interest of the plaintiff in error, under a conditional contract whereby the title was to remain in the vendor until paid for. The parties will be designated herein plaintiff and defendant, as in the court below. On April 29, 1909, the plaintiff submitted to the lumber company the following proposition:

"We propose to furnish you machinery in accordance with attached specifications for the sum of $4,695, including a 11x14 Beck type engine feed, which is not mentioned in the specifications, delivery to be made at Portland. Terms to be $1,500 cash on arrival of the machinery, balance to be paid in equal payments of two. three, four, and five months, dating from shipment of machinery. Transaction to be covered by machinery contract, with notes on deferred payments bearing interest at 8 per cent., notes to be indorsed by the company as well as by your Mr. Bohn and Mr. Collins, personally."

The proposition was accepted in writing, and $100 in cash was paid to the plaintiff. The machinery was thereafter manufactured, and was delivered from time to time until July 23d, when the last installment was delivered. Upon that date the plaintiff made out a statement of the items and the cost thereof, amounting in all to $6,328.54, stating that $2,035.54 was due upon execution of the contract, and asking for a check for that amount less the $100 already paid, and that notes for the remainder be signed, "also contract." Accompanying the statement was a contract to the effect that the sale was conditional, and that the title was to remain in the vendor until the conditions were complied with. The lumber company refused to sign the contract or

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to make the check, or to execute the notes, claiming that the lumber company was entitled to a discount for delay in shipping the machinery, and for changes therein, and that the contract submitted was not the contract agreed upon. On October 28, 1909, the lumber company made a general assignment of its property for the benefit of its creditors. On April 20, 1911, the assignees sold the mill property to the defendant. It was the contention of the defendant that the machinery was sold to the lumber company unconditionally, and that title thereto passed, that the defendant purchased the same without any notice or knowledge of the adverse claim of the plaintiff, and that neither the assignees in insolvency nor the defendant had any knowledge or notice of any defect in the lumber company's title to the property.

[1] As to the original understanding between the contracting parties of date April 29, 1909, the testimony is contradictory. The president of the lumber company testified that there was no agreement that the sale should be conditional. The agent of the plaintiff testified that he explained to the lumber company that, as a great part of the machinery was made up specially, it would have to be sold on a contract, retaining in the plaintiff the title to the machinery until it was paid for. The court below made no finding of fact as to this controverted point, but found that the words in the original proposition "transaction to be covered by machinery contract," together with the fact that but $100 was paid, and the absence of appropriate words of sale in the written proposal, sufficiently indicated that there was no intention to pass title at the time, and that the sale was conditional.

In view of the circumstances so alluded to by the court below and the testimony in the case, we find no ground to disturb the conclusion of that court that the machinery was delivered to the lumber company under an agreement and understanding that the title was to remain in the vendor until the machinery was paid for.

[2] We think also that the positive testimony of the agent of the plaintiff that notice of the plaintiff's claim was given to the defendant prior to the sale, when considered in connection with the uncertain denials of that testimony on the part of the defendant, justifies the conclusion that such notice was given. The defendant was the cashier of the First National Bank of Oregon City, and the property was bid in by him for the bank, on account of a large claim which the bank held against the lumber company. The purchase so made on behalf of the bank lacked the essential elements of a bona fide innocent purchase for value.

[3] Nor do we think that the evidence sustains the contention of the defendant that the plaintiff has waived its claim of title to the property or is estopped to assert the same. The contention is based: First, on a letter which the plaintiff wrote to the lumber company on November 13, 1909, in which the writer said that the plaintiff's position with reference to being "entitled to a lien upon the machinery which we put in the mill is based upon the theory that the refusal of the mill company to give us a machinery contract such as we could file under the registry law, will not be held by the courts to deprive us of the security which we would undoubtedly have lost had we failed to file such a con-

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ditional sale through our own laches"; second, upon the fact that on September 28, 1911, the plaintiff brought an unsuccessful suit in equity against the lumber company and the defendant herein, alleging that the machinery had been delivered, that the transaction was secured by conditional sale contracts, that the lumber company never complied with its agreement, and that by reason of the facts the plaintiff has claimed an equitable lien upon the machinery. These facts, in the absence of proof that the defendant, in reliance thereon, changed his position in regard to the subject-matter of the controversy, or in any way acted thereon, are insufficient to establish waiver or create estoppel.

[4] The defendant contends that, when it bid in the property, the machinery had been made a fixture in the mill, and that therefore it cannot now be removed, citing section 7414, Lord's Oregon Laws. But the evidence shows that the machinery is attached only by bolts and screws, that it can be removed without injury to the structure, and that it is not a fixture within the meaning of the law. Landigan v. Mayer, 32 Or. 245, 250, 51 Pac. 649, 67 Am. St. Rep. 521; Henkle v. Dillon, 15 Or. 610, 17 Pac. 148.

The judgment is affirmed.

(244 Fed. 733)

CHICAGO, M. & ST. P. RY. CO. et al. v. CLEMENT.

(Circuit Court of Appeals, Ninth Circuit. August 20, 1917.)

No. 2900.

1. RAILROADS ⟹344(1)—CROSSING ACCIDENT—LAST CLEAR CHANCE—COMPLAINT.

Complaint in action for death from collision, at railroad crossing, of engine with inclosed milk wagon, *held* to state a cause of action under the last clear chance doctrine.

2. RAILROADS ⟹350(33)—CROSSING ACCIDENT—LAST CLEAR CHANCE—QUESTION FOR JURY.

Under the evidence in action for death from collision, at railroad crossing, of engine with inclosed milk wagon, *held*, that whether the company had the last clear chance to avoid the accident was for the jury.

In Error to the District Court of the United States for the District of Montana; Geo. M. Bourquin, Judge.

Action by David Clement against the Chicago, Milwaukee & St. Paul Railway Company and others. Judgment for plaintiff, and defendants bring error. Affirmed.

The defendant in error was plaintiff in the court below in this action, there brought against the present plaintiffs in error as defendants, to recover for the loss of his son's earnings from the time that he was run over and killed by an engine of the Chicago, Milwaukee & Puget Sound Railway Company to the time he would otherwise have attained his majority. The jury awarded the plaintiff damages in the sum of $2,500, which amount the trial court ruled, on motion made for a new trial, was excesssive to the extent of $1,000. The excess was remitted by the plaintiff under permission granted in an order of the court, and judgment was entered for the plaintiff for $1,500 and costs.

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George F. Shelton, Fred J. Furman, and A. J. Verheyen, all of Butte, Mont., for plaintiffs in error.

B. K. Wheeler and James H. Baldwin, both of Butte, Mont., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge (after stating the facts as above). The only point made on behalf of the plaintiffs in error that we think worthy of mention is the contention that neither the complaint as amended nor the evidence justified the recovery on the ground that the defendant railway company had "the last clear chance" to avoid the fatal collision, and negligently failed in its duty to do so—the pleading and the evidence being based on that doctrine.

[1] In effect, the amended complaint alleges that at the time of the accident the deceased was of about the age of 15 years; that the defendant Woods was the locomotive engineer in charge of the engine, and the defendant Chappell was foreman of the engine crew, and was riding upon the engine operated by Woods, and directed its movements; that at about 4 o'clock in the morning of November 5, 1912, the boy was riding in an inclosed milk wagon drawn by a pair of horses which he was driving, and going in a northerly direction on Montana street in the city of Butte, Mont., toward and near the intersection of the railway company's tracks with the said street, and was not observant of the approach of the train passing along the track in a westerly direction, the engine of which train, in charge of Woods and Chappell, was being used at the time for switching purposes in the yards of the railway company; that both the engineer and Chappell saw the boy coming directly in the path of the engine, and that he was in danger of being struck by it, and that the boy was "unobservant of the approach of the said engine," and, after so seeing the danger, negligently drove the engine against the vehicle in which the boy then was, without giving him any warning of the approach of the train, and without lowering the gates which were at the said crossing; and that by reason of the said negligent operation of the engine the boy was so injured that his death resulted therefrom. We see nothing lacking in these allegations to constitute a cause of action.

[2] It appears from the evidence that at the time of the accident the engine was going westerly and backing, drawing 12 cars loaded with coal and coke, while the boy with the team was approaching the crossing on a road running northerly. East of the crossing, and extending to within a few hundred feet of it, there was a curve in the railroad, and there was also a slight grade there. The night was clear and crisp—cold enough for some frost on the rails. Woods, the engineer, was at his place in the cab, and Chappell was standing on a running board at the rear end of the engine to give the engineer such warnings as should be needed. The testimony of both of those men was given, as well as that of other witnesses.

According to the testimony of the engineer, before reaching the curve the train was moving at about 8 miles an hour, when he applied a little air to the brakes in order to take the curve properly, which

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reduced the speed to about 6 miles an hour. No sand was applied for the reason, as stated by the engineer, that in rounding the curve the pipes would have thrown the sand outside of the rails; but there was other testimony that some sand would have fallen upon the rails. While on the curve, and when, according to the testimony of Chappell, about 400 feet from the crossing, the usual crossing signal of the road in question was given, consisting of one long and two short blasts.

Chappell testified, among other things, that he first saw the team when the train reached the point where the view was unobstructed, at a distance of about 330 to 340 feet; that it was going at a little jog of a trot of about 4 miles an hour, which was not slackened; that he could see that the lines were slack. "I could see the lines," said the witness, "after I—I don't know just what the distance was that I could see the lines, but the slack wasn't taken out of them at the point where I could see them. There was never any effort on his part made to stop that I could see. There was no effort, and the team wasn't checked at any time; they continued in their same gait all the time that I seen them, until the engine struck the wagon." Chappell also testified that at the time of the collision the train was going about 5 miles an hour.

Neither Chappell nor the engineer, according to their testimony, saw the boy at all; but the engineer testified that he also saw that the lines were slack when he got within about 75 feet, and that the horses did not slacken their speed at all until the accident happened. He further testified as follows:

"When I got within about 150 feet or 200 feet of the crossing, I see a team driving up there along the road. The team was approaching at a pretty fair trot; I should judge the team was going 5 miles an hour. It was a covered wagon. I did not see any driver then. I first saw the occupant of the wagon after we stopped, and I got off of the engine and went back and met Mr. Chappell, and we went back to where the boy was laying between the cars; that is the first time that I saw anybody."

Chappell testified, among other things, that when he gave the first signal to the engineer to slow up he was approximately 150 feet east of the crossing, and that when he gave the signal to stop he was from 75 to 100 feet from the crossing; that there was what is called a stopcock on the back of the engine, about a foot away from where he was standing, the opening of which would have enabled the engine to have stopped quicker, which stopcock he failed to open; that he did not "realize that it was necessary, as the engineer could work the brakes from the engine with the same effect as opening the angle cock, until it was too late for me to reach down and open it with my hand," but that before jumping he tried to kick it open, but failed.

The engineer, Woods, also testified that when he got within 75 feet of the crossing, and saw that the team showed no signs of stopping, he did everything in his power to stop the engine; "that is," said the witness, "I throwed the air in the emergency; that is all that I could do. At that time the bell was ringing; the bell was ringing at the time of the collision. I observed the rails after the accident; when I got off the engine I noticed they were frosty. I did not use sand that

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morning; it was on a curve; there was no use using sand, on account of the pipes are bent so that it would just throw it to the side of the rail."

There was also testimony given tending to show that, at the speed at which the train was moving at the time in question, it could have been stopped within from 15 to 25 feet; and Chappell testified that it could have been stopped within from 25 to 40 feet. There can, of course, be no doubt that the boy was guilty of contributory negligence; but his peril, according to the testimony, being known to the operators of the train, whether or not the company had the last clear chance to avoid the accident was, in view of the evidence, a question for the jury. Great Northern Railway Co. v. Harman, 217 Fed. 959, 133 C. C. A. 631, L. R. A. 1915C, 843, and numerous cases there cited.

The instructions upon that question given to the jury by the court below were full, clear, and correct, and we must, accordingly, affirm the judgment.

The judgment is affirmed.

(244 Fed. 736)

MATTERS v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. July 11, 1917.)

No. 4626.

1. CRIMINAL LAW ⟹278(1)—PLEAS IN ABATEMENT—IRREGULARITY IN DRAWING OF GRAND JURY.

   The right to file a plea in abatement for irregularity in drawing the grand jury, months after the indictment was returned, is not absolute, but subject to the sound discretion of the court, and its refusal to rule on such a plea, filed without leave seven months after the indictment was returned, and after two prior pleas had been ruled on, was not error.

2. BANKS AND BANKING ⟹257(3)—EVIDENCE—RELEVANCY.

   On the trial of an indictment charging a violation of the national banking law (Rev. St. § 5209 [Comp. St. 1916, § 9772]), by aiding and inducing the president of a national bank to issue a certificate of deposit without consideration to the bank, which defendant used in part payment of an indebtedness of his own, evidence showing the entire transaction between defendant and his creditor, who was a widow, and tending to show that he attempted to defraud her, was irrelevant to the issue, and its admission was prejudicial error.

In Error to the District Court of the United States for the District of Nebraska; F. A. Youmans, Judge.

Criminal prosecution by the United States against Thomas H. Matters. Judgment of conviction, and defendant brings error. Reversed.

John L. Webster, of Omaha, Neb., for plaintiff in error.

A. W. Lane, Sp. Asst. U. S. Atty., of Lincoln, Neb. (T. S. Allen, U. S. Atty., of Lincoln, Neb., on the brief), for the United States.

Before HOOK, SMITH, and CARLAND, Circuit Judges.

CARLAND, Circuit Judge. Matters was convicted and sentenced upon an indictment which in 20 counts charged him with violating

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section 5209, Rev. St. (Comp. St. 1916, § 9772). The indictment was attacked by motion to quash and by demurrer. The ruling of the trial court in sustaining the indictment is assigned as error, but counsel have not seriously pressed the assignment, further than to draw our attention to what seems to counsel a misconception on the part of the trial court of the essential elements of the crime denounced by the statute. We have examined the indictment and have no doubt of its sufficiency.

[1] The indictment was returned on June 8, 1914, and on December 19, 1914, counsel for defendant, without leave of court, filed a third plea in abatement. The trial court refused to rule upon this plea, and its refusal is assigned as error. The right to file a plea in abatement for irregularity in the drawing of the grand jury, so long after the return of the indictment, was not absolute, but was subject to the sound discretion of the trial court. Its refusal to rule upon the plea was equivalent to a refusal to allow the plea to be filed. In view of the fact that there had been two prior pleas in abatement ruled upon, and that the third plea was presented more than 7 months after the indictment was returned, there was no error in the refusal of the court to consider the plea. Agnew v. United States, 165 U. S. 36, 17 Sup. Ct. 235, 41 L. Ed. 624; Lowdon v. United States, 149 Fed. 673, 79 C. C. A. 361; Moffatt v. United States, 232 Fed. 522, 146 C. C. A. 480; United States v. Rintelen (D. C.) 235 Fed. 787.

The sixteenth count of the indictment charged Matters with aiding and abetting one Luebben, president of the First National Bank of Sutton, Neb., in the misapplication of the funds of the bank, with the intent on the part of each to injure and defraud the same. It was alleged in this count that Luebben as president, without any consideration passing to the bank from any one, on June 4, 1913, issued a certificate of deposit at the request of Matters, payable to the order of one Mary E. Johnson, for the sum of $1,500; that Matters delivered the certificate of deposit to the payee thereof in payment of a debt and obligation owing by Matters to said Mary E. Johnson; that the amount of said certificate was subsequently paid by Luebben as president of the bank to the payee, without any consideration passing to the bank therefor. Matters at the trial did not dispute that the certificate of deposit was delivered by him to Mary E. Johnson in part payment of his personal debt, but contended that the certificate was obtained from the bank in a legitimate way. The prosecution, for the purpose of proving the charge made in the sixteenth count, placed Mary E. Johnson, the payee named in the certificate of deposit, upon the stand as a witness. Her testimony, reduced to narrative form, covers over 20 pages of the record, and cannot be detailed in this opinion. It is sufficient to say, however, that the witness, over the repeated objections and exceptions of counsel for Matters, was allowed to narrate the history of a financial transaction between herself and Matters, extending over a period of 3 years and 6 months prior to the issuance of the certificate of deposit.

The witness was allowed to testify that the debt of Matters to her was originally contracted early in the year 1910, by the delivery by

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her to Matters of $2,500, the proceeds of her husband's life insurance, upon the representation by Matters that he would invest the money in Dakota lands and would double the money in a year, and that he would return it to the witness at any time on 30 days' notice; that when the year expired she asked Matters for a return of the money, but was put off from time to time until about the middle of December, 1912, upon the plea that sales had not been good; that at this time some of her friends undertook to assist her in securing the return of the money; that Matters finally promised to pay her the money on a particular day, and on that day she went to see him accompanied by Mr. Burkett and Mrs. Edwards. On that occasion, although Matters declared he had the money, he refused outright to pay the witness anything, for the reason, as he said, that he had not been given the proper notice; that Matters and the witness were members of the same church; that, when she was unable by her own efforts to obtain the repayment of the money from Matters, she took the matter to the church, and later she went to Matters' office, accompanied by the pastor and three members of the church, and that on this occasion prayer was offered up that Matters might be made to see the errors of his ways and repay the money; that the witness told Matters that he would sell his soul for a mess of pottage; that at this last interview Matters demanded an additional 30 days' time, and insisted upon writing the notice to be given by the witness to Matters that he should repay the money; that in writing this notice he incorporated what purported to be a receipt for a mortgage which the witness never had seen, and purporting to be signed by parties of whom she never had heard. In the brief of learned counsel for the government, the following observation is made in regard to this paper:

> "The date of this was February 17, 1913, and was transparently an artful attempt to shift the form of the obligation, and to get away from the real character of the indebtedness."

The witness was further permitted to testify that the money was not paid at the expiration of 30 days, and about April 9, 1913, the witness went again to the office of Matters, accompanied by E. G. Jones; that the witness had visited the office of Matters for the purpose of collecting this money hundreds of times; that finally, upon the advice of Mr. Jones, the witness received from Matters, in settlement of her indebtedness against him, not only the $1,500 certificate of deposit, mentioned in the sixteenth count, but also another certificate of deposit, issued by the Sutton National Bank, for $2,000; that the certificate for $2,000 was unpaid when the bank failed; that witness received from Matters a deed for 160 acres of land in Banner county, Neb., on account of the certificate for $2,000; that she was never satisfied with the settlement, and had never been able to sell the Banner county farm for anything.

[2] If counsel for the government make the argument to us that the writing of the paper on February 17, 1913, was transparently an artful attempt to shift the form of the obligation and to get away from the real character of the indebtedness, it is very easy to infer what use was made of all this testimony before the jury. Matters

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was not on trial for defrauding or attempting to defraud a widow of the life insurance money of her husband, and we think it was clearly prejudicial error to allow the whole transaction between the witness Mary E. Johnson and Matters to be investigated. The average citizen rightfully has little patience with those who violate the laws which regulate the banking institutions of the country, and for this reason, in this class of cases especially, the evidence should be confined to the allegations of the indictment.

It is claimed by counsel for the government that the evidence was relevant upon the question of the intent of the defendant in securing the issuance of the certificate of $1,500, for the reason that it showed that Matters was embarrassed and unable to pay his debts. We are of the opinion that, conceding the insolvency of Matters was material to the inquiry before the court, it did not justify the admission in evidence of the whole history of the transaction between Mary E. Johnson and Matters. The primary effect of the evidence was to show that Matters had attempted to defraud Mrs. Johnson out of her money. The effect, if any, of the evidence upon the real issue in the case being tried was so incidental and small that it would be lost, so far as the jury was concerned, in the presence of those features of the testimony to which we have adverted. The introduction of the evidence in our judgment prevented a fair trial.

There are many other grave errors assigned in the record, but as there must be a new trial, and the errors complained of may not occur again, we do not find it necessary to consider them.

For error in the admission of the testimony heretofore described, the judgment below is reversed, and a new trial ordered.

(244 Fed. 739)

WHITE, Immigration Com'r, v. TOM YUEN.

(Circuit Court of Appeals, Ninth Circuit. August 6, 1917.)

No. 2776.

ALIENS ⟹32(8)—DEPORTATION OF CHINESE—SUFFICIENCY OF IDENTIFICATION —STATUTE.

The mere ex parte statement of a resident of Mexico that he was a policeman there, and, when shown a photograph, stated that he knew the original, and had seen him at a race track in Mexico seven or eight months before he made the statement, the identification from the photograph not being made in the presence of its original, a Chinese sought to be deported for having entered the United States from Mexico in violation of Chinese Exclusion Act Sept. 13, 1888, c. 1015, § 7, 25 Stat. 479 (Comp. St. 1916, § 4308), was not sufficient legal foundation for an order of deportation.

Appeal from the District Court of the United States for the First Division of the Northern District of California; Maurice T. Dooling, Judge.

Petition for habeas corpus by Tom Yuen against Edward White, as Commissioner of Immigration at the Port of San Francisco. From

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an order for petitioner's discharge, the Commissioner of Immigration appeals. Order affirmed.

See, also, 230 Fed. 656.

John W. Preston, U. S. Atty., and Casper A. Ornbaun, Asst. U. S. Atty., both of San Francisco, Cal., for appellant.

John L. McNab and Timothy Healy, both of San Francisco, Cal., for appellee.

Before GILBERT and HUNT, Circuit Judges, and WOLVERTON, District Judge.

HUNT, Circuit Judge. In August, 1915, Tom Yuen, a Chinaman, was arrested at Los Angeles charged with having re-entered the United States in violation of section 7, Chinese Exclusion Act of September 13, 1888, being a Chinese laborer who failed to produce to the proper officer the proper return certificate, and with having entered the United States in violation of section 36, Immigration Act February 20, 1907, c. 1134, 34 Stat. 908 (Comp. St. 1916, § 4285). Section 7, referred to, provides, among other things, that no Chinese laborer shall be permitted to re-enter the United States without producing to the proper officers the return certificate conforming to prescribed requirements. If he possesses such certificate, he may be readmitted only at the point from which he departed the United States. After Tom Yuen's arrest there was an investigation before the immigration authorities, and it resulted that finally it was found that he had entered the United States from Mexico near El Paso, Tex., without inspection, about August 1, 1915, and re-entered in violation of section 7 of the exclusion act of September 13, 1888. The Secretary of Labor issued a warrant of deportation. Tom Yuen then applied for a writ of habeas corpus before the District Court at San Francisco, and set up that he had not had a fair and impartial trial and hearing by the immigration officers. His particular complaint was that there was no evidence that he had entered the United States within the last three years preceding the date of his arrest by the authorities; that he had resided in the United States as a registered Chinese laborer, having been registered at New York on March 2, 1894, and that he was the holder and owner of Chinese laborer's certificate of residence No. 28667. The commissioner of immigration at San Francisco denied the averments of the petitioner with respect to illegal detention, and by stipulation the testimony, evidence, exhibits, and record had and taken at the hearing before the immigration officials were made part of the record and submitted to the District Court. The court held that the petitioner was illegally restrained as alleged in his petition, and ordered his discharge. The commissioner of immigration appeals.

At the examination before the immigration officials the alien said that he had entered the United States at San Francisco about the year 1882; that he went from San Francisco to New York and remained in New York fourteen or fifteen years; that he then returned to San Francisco for a few months, and then went to Lordsburg, N. M., where he lived continuously for six or seven years working at night in a restaurant owned by Tom Tong; that he went from Lordsburg to Los

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Angeles, where he was arrested. It is admitted that when arrested he had in his possession laborer's certificate of residence 28667 issued to Tom Yuen, laundryman, 264 West Forty-Seventh street in New York, March 21, 1894. He denied that he had ever been to Mexico. Several persons, Chinese and others, testified before the immigration authorities that they had never seen or heard of Tom Yuen at Lordsburg; on the other hand, some Chinamen and a Mexican, one Marquez, stated by affidavits filed that they had known and seen the man in Lordsburg for some years preceding July, 1915. The only direct evidence that Tom Yuen was seen in Mexico was an ex parte statement by M. O. Acosta, of Juarez, who said that he was a policeman at Juarez, and when shown a photograph of the alien said that he knew the original of the photograph, and had seen him at a race track in Juarez in the latter part of December, 1914, and the early part of January, 1915, or seven or eight months before he made his statement.

The issues in the case are very close to those presented in Backus v. Owe Sam Goon, 235 Fed. 847, 149 C. C. A. 159, recently decided. That was the case of a Chinaman, laborer, ordered deported, and who applied for habeas corpus. The order of deportation was based upon the ground that the alien had entered the United States from Mexico in violation of section 7 of the before-mentioned act, without producing the proper return certificate. We there quoted the several pertinent provisions of the Immigration Act of 1888 and 1907 and the amendments, and held that the mere statement of one in Mexico who identified a photograph of the accused Chinaman, the identification from the photograph not being made in the presence of the accused, and with no opportunity in the accused to examine the identifying witness concerning the statements he makes, is not a sufficient foundation for an order of deportation under the Chinese exclusion law, and said:

> "As has been repeatedly stated, it is not our function to weigh the evidence in this class of cases; but we may properly consider the jurisdictional question of law whether there was evidence to sustain the conclusion that the accused was in the United States in violation of law and subject to deportation under section 21 of the Immigration Act. In the absence of the best evidence attainable to sustain the same, we may also conclude that the order of deportation was arbitrary and unfair, and subject to judicial review."

Counsel for the appellant make the point that the order of deportation of the Secretary of Labor was based also upon the ground that Tom Yuen was in the United States in violation of Act Feb. 20, 1907, 34 Stat. 898, having entered in violation of section 36 thereof without the inspection required by the act of all aliens, including Chinese, and argue that a finding in accordance therewith is sufficient to support the order of deportation. Section 36 (4285) provides in part that an alien who enters the United States except at the sea ports thereof or at such places as the Secretary of Labor shall designate, shall be deported as provided by sections 20 and 21 of the Immigration Act (Comp. St. 1916, §§ 4269, 4270). But, as we have found that there was no sufficient showing that the Chinaman ever entered the United States from Mexico, there is no sustained premise upon which the contention can rest.

The order appealed from is affirmed.

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(244 Fed. 742)

MOK NUEY TAU v. WHITE, Immigration Commissioner.

(Circuit Court of Appeals, Ninth Circuit. August 20, 1917. Rehearing Denied October 8, 1917.)

No. 2944.

1. ALIENS ⟹32(2)—DEPORTATION—JURISDICTION OF EXECUTIVE DEPARTMENT. A Chinese alien who secured admission into the United States in violation of any of the provisions of Immigration Act Feb. 20, 1907, c. 1134, 34 Stat. 898, may be deported on an order of the Commissioner of Labor under section 20 of that act (Comp. St. 1916, § 4269), at any time within three years.

2. ALIENS ⟹32(8)—PROCEEDINGS FOR DEPORTATION—FAIRNESS OF HEARING. Proceedings for deportation of a Chinese person *held* not unfair, and an order of deportation *held* sustained by the evidence.

Appeal from the District Court of the United States for the First Division of the Northern District of California; Maurice T. Dooling, Judge.

Habeas corpus proceedings by Mok Nuey Tau against Edward White, Commissioner of Immigration for the Port of San Francisco. From an order denying his petition, petitioner appeals. Affirmed.

Geo. A. McGowan, of San Francisco, Cal., for appellant.

John W. Preston, U. S. Atty., and Casper A. Ornbaun, Asst. U. S. Atty., both of San Francisco, Cal., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. On November 9, 1915, the appellant, then nine years of age was admitted to the United States as the foreign-born son of Mock Juck, who was a native-born citizen of the United States residing at Oakland, Cal. A month after his arrival he went from San Francisco to the state of Alabama, where seven months later he was arrested on the executive warrant of the Secretary of Labor and was ordered deported on the ground that he was an alien found in the United States in violation of the act of February 20, 1907, as amended by the act of March 26, 1910 (36 Stat. 263, c. 128 [Comp. St. 1916, §§ 4244, 4247]). He appeals from the order of the court below sustaining a demurrer to his petition for a writ of habeas corpus.

[1] It is contended on behalf of the appellant that if he is illegally in the United States he is entitled to have that fact determined by the judicial branch of the government, and that the Secretary of Labor is without jurisdiction. The contention cannot be sustained. In United States v. Wong You, 223 U. S. 67, 32 Sup. Ct. 195, 56 L. Ed. 354, it was held that Chinamen who had entered the United States surreptitiously, in a manner prohibited by section 36 of the Immigration Act of February 20, 1907 (Comp. St. 1916, § 4285), were subject to be deported by the Secretary of Commerce and Labor under the provisions of that act. Section 20 of the act provides that any

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alien who shall enter the United States in violation of law shall, upon the warrant of the Secretary of Commerce and Labor, be taken into custody and deported to the country whence he came, at any time within three years after the date of his entry into the United States. The appellant, if the charge is true that he "secured admission by fraud, not having been, at the time of entry, the minor son of a member of the exempt classes," came in violation of that section of the Immigration Act of 1907, and is subject to deportation as provided in that act. Backus v. Owe Sam Goon, 235 Fed. 847, 149 C. C. A. 159.

[2] It is contended that the hearing was unfair, in that no opportunity was given the appellant to be represented by counsel until after he had been subjected to an examination. It appears that at the close of his examination the appellant was informed that the warrant of arrest provided that he might be released on a bond in the sum of $1,000, and he was asked if he had friends who would give the bond. He answered: "Yes, Loo Yut is looking after that for me." And when he was informed that he had the right to be represented by an attorney, and asked if he wished to avail himself of that right, he said: "I don't understand that. I will see Loo Yut." Loo Yut was thereupon examined. He testified that the appellant was living with him at Alexander City, that Mock Juck was the appellant's father, and that he had corresponded with Mock Juck, who resided at Oakland, Cal. Loo Yut, when he was informed that the appellant, when told that he had the right to be represented by an attorney, had said that he would see him (Loo Yut) about it, answered: "No, I will not employ a lawyer now. I will wait and see what they do in Washington." The appellant was then released on a bond in the sum of $1,000, to obtain which Loo Yut deposited $1,000 in cash.

The proceedings before the immigration officials are not required to conform to judicial procedure. It was not necessary that the appellant be represented by a guardian ad litem. It was proper to subject him to an examination. He was not entitled to be represented by an attorney at the preliminary examination. Low Wah Suey v. Backus, 225 U. S. 460, 32 Sup. Ct. 734, 56 L. Ed. 1165. The examination furnishes no evidence that any unfair advantage was taken of him. He was called upon to answer the same questions which he had answered eight months before on his application for admission. His answers were widely different from those which he had given before. It was a legitimate inference which the officers drew from the wide and marked discrepancies between the answers that the appellant had been coached for his prior examination, and that in the interval he had forgotten what he had been taught to say. It would serve no useful purpose to review the discrepancies in detail. They were sufficient to justify the conclusion that the appellant had secured admission to the United States through fraudulent representations. The fact that the inspector in charge added that since the hearing information had been obtained, to the effect that the appellant was the son of Loo Gee of Birmingham, Ala., and that Loo Yut was his uncle, and that the information was received in a confidential manner from one Chung Kee

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Lung, "but no statement could be secured from him for obvious reasons," does not appear to have influenced the final decision.

The discrepancies in the appellant's statements are sufficient to answer the contention of his counsel that the warrant of deportation was unsupported by evidence.

The judgment is affirmed.

ROSS, Circuit Judge (concurring). I concur in the judgment and the opinion of the court, except in that clause thereof which holds that the appellant "was not entitled to be represented by an attorney at the examination."

(244 Fed. 744)

THE SAMARINDA.*

(Circuit Court of Appeals, Fourth Circuit. July 24, 1917.)

No. 1523.

COLLISION ⚷94—OVERTAKING VESSELS—FAULT.

A collision between an overtaking and the overtaken vessel in a channel at least 600 feet wide *held* to have been due solely to the fault of the overtaking vessel, which was much the larger, in changing her course more than was necessary at a bend in the channel, so as to converge on the course of the smaller vessel, although the two had been running side by side for two miles.

Appeal from the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge.

Suits in admiralty for collision by C. W. Visser, master and claimant of the steamship Samarinda, and the Kingdom of the Netherlands, against the steamer Brandon, the New England Coal & Coke Company, claimant, with cross-libel against the Samarinda. Decree for respondent and cross-libelant, and libelants appeal. Affirmed.

For opinion below, see 237 Fed. 252.

R. E. Lee Marshall, of Baltimore, Md., for appellant Visser.

John Henry Skeen, of Baltimore, Md., for appellant The Kingdom of the Netherlands.

Edward E. Blodgett, of Boston, Mass. (Blodgett, Jones, Burnham & Bingham, of Boston, Mass., on brief), for appellee.

Before PRITCHARD and WOODS, Circuit Judges, and DAYTON, District Judge.

DAYTON, District Judge. A collision occurred on May 30, 1916, about 4:25 p. m., nearly opposite buoy C–1–B in the turn between Brewerton channel and Cut-Off channel in the Patapsco river, between the Dutch steamer Samarinda and the American steamer Brandon. Both ships were full loaded; the Brandon with coal, the Samarinda with grain belonging to the kingdom of the Netherlands. Both ships were badly damaged, and a loss on the cargo of the Samarinda was sustained by the owner thereof. In the court below libel and

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*Rehearing denied November 19, 1917.

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amended libels were filed by the master and claimant of the Samarinda against the Brandon, by the New England Coal & Coke Company, sole owner of the Brandon, against the Samarinda, and by the kingdom of the Netherlands, as owner of the cargo on the Samarinda, against the Brandon. The usual order of consolidation was made, a hearing in open court had, and the matter comes here on appeal from the lower court's decree ascertaining the Samarinda to have been solely in fault.

The Brandon was much the smaller vessel. She left her anchorage first. At the entrance of the Ft. McHenry channel she was at least three-fourths of a mile ahead of the Samarinda; but the latter, being the faster vessel, gained on her until, after passing the turn buoy marking the intersection of the Ft. McHenry with the Brewerton channel, the Samarinda was not more than half a mile behind. There she gave the passing signals, which were answered by the Brandon. The Samarinda came up with the Brandon about opposite the entrance to the Sparrows Point channel, something like a mile and a half from the point where the passing signals were exchanged. Instead, however, of passing each other, the two vessels for the next 2 miles ran side by side in Brewerton channel. This channel was 600 feet wide. The Brandon was on the starboard and the Samarinda on the port side of the channel's center line, and each claims to have run within from 40 to 75 feet of the buoys on their respective sides. They must have been, therefore, from 300 to 400 feet apart. The engines of neither of the vessels were touched until shortly before the collision, when those of the Samarinda were speeded up and those of the Brandon slowed down. Under all ordinary conditions the Samarinda at the point of collision should have been more than a quarter of a mile beyond the Brandon. It is impossible to definitely determine why she was not. In our view of the case it is not necessary for us to attempt to account for this anomalous situation.

Side by side the two ships came to the Turn channel, which is 1¾ compass points more southerly than the Brewerton. Here both ships changed course, the Brandon making a very natural and obvious 1¾-point change in order to conform to the course of the channel, which kept her course still only about 50 feet from the channel buoys on her side. On the other hand, the Samarinda changed her course 2 full points, which inevitably caused her to converge to the extent of a quarter compass point upon the course of the Brandon. In the distance from buoy 3–B, where this change was made, to 1–B, where the collision occurred, this convergence reduced the distance between the ships 140 feet. At the time of the collision the ships were not to exceed 160 feet, and more likely not more than 60 feet, apart. The Samarinda had forged ahead about two-thirds of her length, or 300 feet. Then it was that the bow of the Brandon sheered in and struck the Samarinda with her anchor and the bluff of her bow about 68 feet forward of her stern. The contest in the case has waged over the inducing cause of this action on the part of the Brandon; she claiming that it was inevitable by reason of the suction force exerted over her, the smaller vessel, by the much larger one. On the other hand, the Samarinda charges it was either deliberate or the result of insufficient

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rudder area, by reason of which she steered badly, and was liable tc and did get out of hand and control.

In our judgment the learned judge who heard the cause below justly and rightly reached the conclusion that the fault was that of the Samarinda in changing its course, after running side by side for 2 miles with this smaller vessel, so as to converge upon and bring about a condition where she must either pass or crowd the Brandon out of her course in the channel, or run the risk of the collision which occurred.

We cannot more clearly and concisely set forth the reasons for this conclusion than has been done by the trial judge in these words:

"Doubtless the 2-point change by the pilot of the Samarinda was the one usually there made. Under ordinary circumstances, it is a convenient one. An inspection of the chart will show that such change would bring the Samarinda to the entrance of the Cut-Off channel on the starboard side of the channel, the proper position for her to take with reference to vessels which might be coming up inward bound. But the same inspection will show that there was no necessity to make such a change in course when it was made, for the buoy line on the northern and easternmost or Samarinda side of the Brewerton channel extends more than a half a mile beyond 3–B to 14 K. and there was plenty of room for the pilot of the Samarinda to keep entirely clear of the course of the Brandon. In view of the proximity of the latter vessel, the Samarinda had no right to put herself on a course which would necessarily converge upon that of the Brandon. Of course, if the Samarinda drew ahead of the Brandon sufficiently to be clear of her before she came close enough in any wise to embarrass her navigation, no harm would result: but when the Samarinda chose unnecessarily to lay her course toward that of the Brandon, she, the overtaking vessel, assumed any risk which that maneuver might occasion. In view of the way in which the two vessels had kept side by side for 2 miles or more, the pilot of the Samarinda was not justified in assuming that, before the two courses came close together, he would be well ahead of the Brandon and out of her way. It is true that the Samarinda was the faster vessel, and he not unlikely knew that fact; but, if he did know it, he should also have appreciated that something out of the ordinary was happening, when the two ships had for so long kept side by side. The widening of the channel at the time gave him an opportunity to break whatever force was keeping the two vessels together, by putting a greater distance between them. He decided to bring them close together."

The decree appealed from will be in all respects affirmed.

Affirmed.

(244 Fed. 746)

QUAN YOU v. WHITE, Immigration Com'r.

(Circuit Court of Appeals, Ninth Circuit. August 20, 1917. Rehearing Denied October 8, 1917.)

No. 2945.

1. ALIENS ⟹32(2)—DEPORTATION OF CHINESE—JURISDICTION.

   The Commissioner of Labor has authority, under Immigration Act Feb. 20, 1907, c. 1134, § 20, 34 Stat. 904 (Comp. St. 1916, § 4269), to order the deportation of a Chinese alien found illegally in this country, within three years after his entry.

2. ALIENS ⟹32(8)—PROCEEDINGS FOR DEPORTATION OF CHINESE—FAIRNESS OF HEARING.

   Proceedings for deportation of a Chinese alien *held* not unfair, and an order for his deportation sustained by the evidence.

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Appeal from the District Court of the United States for the First Division of the Northern District of California; Maurice T. Dooling, Judge.

Habeas corpus by Quan You, otherwise known as Low June, against Edward White, Commissioner of Immigration at the port of San Francisco. From an order dismissing the petition, petitioner appeals. Affirmed.

Geo. A. McGowan, of San Francisco, Cal., for appellant.

John W. Preston, U. S. Atty., and Casper A. Ornbaun, Asst. U. S. Atty., both of San Francisco, Cal., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. The judgment from which this appeal comes sustained a demurrer to a petition in behalf of Quan You, otherwise known as Low June, a native of China, for a writ of habeas corpus, and dismissed it.

[1] This Chinese alien was ordered deported by the Secretary of Labor on the ground that he was found to be illegally in this country, and the first of the two points made in support of the appeal is that the secretary had no jurisdiction in the premises, and that the person so charged to be illegally in the United States was entitled to have the fact determined by the judicial branch of the government. That point is well answered by the cases of Backus v. Owe Sam Goon, 235 Fed. 847, 149 C. C. A. 159, and United States v. Woy You, 223 U. S. 67, 32 Sup. Ct. 195, 56 L. Ed. 354.

[2] The only other point made on behalf of the appellant is that the hearing of the question before the executive officers of the government was unfair, in that he was not "notified of his right to inspect the record, or being informed of the evidence presented against him, or of his right to be present at any future hearings to be had, and being prevented by the inadequacy of his arraignment from knowing how he could be benefited by having counsel to defend him." The record shows that it was stipulated by and between the attorneys of the respective parties that the original immigration record should be considered as part and parcel of the petition for the writ of habeas corpus, and that record was so considered by the court below, and has been brought and submitted here, pursuant to the same stipulation.

Rule 22, promulgated by the Bureau of Immigration of the Department of Labor, provides in part (subdivision 4, paragraph "b") as follows:

"During the course of the hearing the alien shall be allowed to inspect the warrant of arrest and all the evidence on which it was issued; and at such stage thereof as the officer before whom the hearing is held shall deem proper, he shall be apprised that he may thereafter be represented by counsel and shall be required then and there to state whether he desires counsel or waives the same, and his reply shall be entered on the record. If counsel be selected, he shall be permitted to be present during the further conduct of the hearing, to inspect and make a copy of the minutes of the hearing, so far as it has proceeded, and to offer evidence to meet any evidence theretofore or thereafter presented by the government. Objections and exceptions of counsel shall not be entered on the record, but may be dealt with in an accompanying brief.

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If during the hearing new facts are proved which constitute a reason additional to those stated in the warrant of arrest why the alien is in the country in violation of law, the alien's attention shall be directed to such facts and reason, and he shall be given an opportunity to show cause why he should not be deported therefor."

Referring to that rule, this court said in the case of Wong Back Sue v. Connell, 233 Fed. 659, 662, 147 C. C. A. 467, 470:

"While this rule may be so arbitrarily applied by immigration officials as to deprive an alien of a full and fair hearing and violate his fundamental rights, as shown in Ong Chew Lung v. Burnett, 232 Fed. 853, 147 C. C. A. 47, in our opinion the rights of the petitioner herein have not been transgressed. His examination appears to have been simply and fairly conducted. The questions asked were confined to material matters, and were expressed in very direct language, apparently used with no desire on the part of the inspector to entrap or oppress or 'catch' the alien. The question, therefore, is whether the fundamental rights of the alien were infringed by the action of the immigration officer in not telling the alien that he could inspect the warrant of arrest and that he had a right to counsel, and inquiring if he wished to avail himself of the right, until after direct preliminary examination of the alien by the inspector had been practically ended. If there were nothing in the record to counteract the injustice of such a course of procedure, we would be very strongly disposed to hold that the alien was not given a fair hearing, as required by law. But it expressly appears that, before any testimony was heard by the inspector, the warrant was read and explained to the alien, and that he was advised of the nature of the proceedings, and that he could be released on bail during their pendency. And while it would seem to be just that prior to a hearing before the immigration officials an alien should also be told of his right to have counsel at the hearing, yet, considering the information given to this petitioner, we cannot say that omission to tell him of his right until after material questions were put and answered invalidated the whole proceeding."

Applying the foregoing observations, with which we are entirely satisfied, to the voluminous record of the proceedings had and taken before the executive officers in the present case, which included the testimony of the petitioner, we think it too obvious to admit of doubt that at the time the appellant obtained, in June, 1912, a return certificate from the government, based upon the representation that he was a member of a certain mercantile firm in California (upon which certificate he was admitted upon his return to this country in 1916), he was not a merchant, but a laundryman in the state of Alabama, and had been such for a number of years, and to which character of labor he returned upon coming back to the United States, and in which he was engaged at the time of his arrest.

It is unnecessary to refer in detail to the record, which we think shows that he had sufficient opportunity to present whatever case he had, and that the order for his deportation was in accordance with the requirements of the law.

The judgment is affirmed.

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(244 Fed. 749)

CHEW HOY QUONG v. WHITE, Immigration Com'r.

(Circuit Court of Appeals, Ninth Circuit. August 6, 1917. Rehearing Denied October 8, 1917.)

No. 2926.

1. ALIENS ⟹32(11)—HEARING ON APPLICATION FOR ENTRY—REHEARINGS.
On application of a Chinese alien for entry, the commissioner has jurisdiction to order rehearings until the facts are sufficiently developed to afford a basis for his judgment.

2. ALIENS ⟹32(12) — DEPORTATION OF CHINESE — DENIAL OF ADMISSION—FAIRNESS OF HEARING.
An order denying admission to this country of a Chinese alien *held* to have been made after a fair hearing and to be sustained by the evidence.

Appeal from the District Court of the United States for the Southern Division of the Northern District of California; Maurice T. Dooling, Judge.

Habeas corpus by Chew Hoy Quong against Edward White, Commissioner of Immigration at the Port of San Francisco. From an order sustaining a demurrer to the petition, petitioner appeals. Affirmed.

Dion R. Holm and Roy A. Bronson, both of San Francisco, Cal., for appellant.

John W. Preston, U. S. Atty., and Casper A. Ornbaun, Asst. U. S. Atty., both of San Francisco, Cal., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The court below sustained a demurrer to the petition of the appellant for a writ of habeas corpus on behalf of Quok Shee, who he alleged was his wife, and who had been denied admission to the United States and ordered deported to China. The proceedings before the immigration officials touching the right of Quok Shee to land were presented in court and deemed a part of the petition.

[1] The appellant contends that the records show, and that the fact was that Quok Shee was denied a full and fair hearing, and that the commissioner exceeded his power, in that after a first hearing and a favorable report by an immigrant inspector, a second hearing was ordered, and a contrary conclusion was reached. As to the latter contention, it appears that on September 5, 1916, the immigration inspector who conducted the first hearing recommended favorable action, notwithstanding that he noted a discrepancy in the testimony. Six days later the commissioner ordered a rehearing, and on September 15, 1916, upon the evidence thereupon adduced, the inspector reported unfavorably to the applicant, and on the same day the commissioner found that the existence of the relationship claimed was not established to his satisfaction, and denied the application. We entertain no doubt that the commissioner had jurisdiction to order rehearings until the facts were fully developed, or at least sufficiently developed to present a basis for his judgment. We find nothing in the record to justify the charge that the hearing was not full and fair.

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[2] The appellant contends that the case should have been reopened to afford him opportunity to explain the discrepancies in the testimony of the appellant and Quok Shee. The application to reopen was denied for the reason, as stated, that there was no apparent ground for assuming that any contradictory statements appearing in the record were due to a misunderstanding of the questions propounded, and that the newly proffered affidavit of the appellant was not new evidence, within the meaning of the regulations. The appellant's contention that the testimony was disregarded, and that there was no substantial evidence on which to base the order cannot be sustained. While it is true that the appellant and Quok Shee agreed in their testimony as to very many of the points concerning which they testified, it is also true that as to certain items there were distinct contradictions. They claim to have lived together as husband and wife for a period of seven months before leaving China. In their testimony they differed as to the number of times the appellant visited his native village during that period, as to the number of times that the adopted son of the appellant visited him, as to the question whether a member of the firm occupying the building in which they lived accompanied them to the steamer, as to who occupied the second floor of the building in which they lived, as to whether there was a fourth floor to the building, and as to other matters of like nature. In view of those discrepancies, it should not be said, as a matter of law, that there was no evidence to justify the conclusion of the immigration officials. They deemed those discrepancies "important and material," and their conclusion does not appear to rest upon the suspicious fact, adverted to in the report of the Assistant Commissioner General, that the appellant was 56 years of age, while Quok Shee was but 20, which omission or postponement on the appellant's part to comply with the ancient and established usage and customs of Chinese until so late in life was said to lend "suspicion to the relationship," since "Chinese customs frown upon the marriage of old men with young girls."

The judgment is affirmed.

(244 Fed. 750)

UNITED STATES v. CANNON et al.

(Circuit Court of Appeals, Ninth Circuit. August 6, 1917.)

PUBLIC LANDS ⟹120—SUIT FOR CANCELLATION OF PATENT—PROOF OF FRAUD.

A finding of the trial court on conflicting evidence, on the trial of a suit for the cancellation of a homestead patent, that the evidence did not support the allegations of fraud, affirmed.

Appeal from the District Court of the United States for the District of Montana; Geo. M. Bourquin, Judge.

Suit in equity by the United States against Harry Cannon and Walter D. Storey. Decree for defendants, and complainant appeals. Affirmed.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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Burton K. Wheeler, U. S. Atty., of Butte, Mont., Homer G. Murphy, Asst. U. S. Atty., of Helena, Mont., and James H. Baldwin, Asst. U. S. Atty., of Butte, Mont., for the United States.

C. L. Harris and Johnston & Coleman, all of Billings, Mont., for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The United States brought suit against the appellees to cancel a patent issued to the appellee Cannon on June 26, 1911, for a homestead entry made by Cannon on May 1, 1909, on land which thereafter, on August 5, 1912, Cannon conveyed to the appellee Storey. The complaint alleged that Cannon obtained the patent by fraudulent representations made in his final proofs as to his residence on the land and his cultivation thereof, and that Storey purchased with full knowledge of the fraud. The court below, upon the conflicting evidence, found for the appellees, and dismissed the complaint.

The appellant contends that the court erred in finding that the evidence was insufficient to sustain the allegations of the complaint. We have carefully examined the testimony, which was all taken in open court, and we think the case is clearly one for the application of the rule that the findings of fact of a court of equity will not be disturbed or modified by an appellate court unless an obvious error has intervened in the application of the law, or grave mistake has been made in the consideration of the facts. The contention of the appellant rests upon certain suspicious circumstances in the case, and the negative testimony of witnesses who at intervals traveled across the premises so occupied as a homestead, between May, 1909, and January, 1911, and did not see the homestead claimant occupying the same nor discover evidences of his occupation other than the fact that some of the land had been cultivated. The suspicious circumstances relied upon are that prior to 1909 Cannon had been in Storey's employment; that prior to that year Storey had made a homestead entry on the same tract of land; that when Storey relinquished his homestead claim on May 1, 1909, he and Cannon went to the land office on the same train, and immediately after Storey's relinquishment Cannon filed his homestead entry; that during the time between entry and patent, Cannon was engaged in training horses on the premises of Storey, about a mile and a half from the homestead, and for that purpose rented stable room from Storey, for which he paid by the day, and a part of the time boarded at Storey's, for which he paid by the week; that the cultivation of the land was done by Storey, who furnished teams and seed for that purpose on an agreement whereby he was to receive the whole of the crop; that 16 months after making his final proof, Cannon, in consideration of $1,000, conveyed the lands to Storey. All these facts are reconcilable with the theory that the appellees acted in good faith. It was shown, and it was not contradicted, that after final proof Cannon made substantial improvements on the place and resided there for more than a year, and there was evidence, which the court below credited, that Cannon, prior to the final proof, continuously resided upon the land, although he was not continuously present thereon, and there

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was evidence tending to show that the improvements and cultivation of the homestead after entry and before final proof were not substantially misrepresented to the officers of the land office.

The decree is affirmed.

(244 Fed. 752)

MIAMI COPPER CO. v. MINERALS SEPARATION, Limited.

MINERALS SEPARATION, Limited, v. MIAMI COPPER CO.

(Circuit Court of Appeals, Third Circuit. May 24, 1917.)

Nos. 2180, 2181.

1. PATENTS ⟹328—INFRINGEMENT—PROCESS OF CONCENTRATING ORES.

The Sulman, Picard, and Ballot patent, No. 835,120, for a process of concentrating ores, known as the air flotation process, which consists in mixing the powdered ore with water containing a fraction of 1 per cent. on the ore of oil having an affinity for the ore particles, impregnating the mixture with air, agitating the same until the oil-coated mineral matter forms into a froth composed of air bubbles, and separating the froth from the remainder of the mixture, construed, and claims 1 and 12 *held* infringed.

2. PATENTS ⟹232—INFRINGEMENT—PROCESS PATENT.

A defendant, having used the steps of a patented process until, if it stopped there, it would produce the result of the patent, cannot avoid infringement by taking an additional step, even though that step, if taken alone, avoids the patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 365.]

3. PATENTS ⟹328—VALIDITY AND INFRINGEMENT—PROCESS OF CONCENTRATING ORES.

The Sulman, Greenway, and Higgins patent, No. 962,678, for a process of concentrating ores, which consists in mixing the powdered ore with water containing in solution a small quantity of a mineral frothing agent, agitating the mixture to form a froth, and separating the froth, the difference between such process and that of patent No. 835,120 being in the employment of a mineral frothing agent, instead of oil, was not anticipated and discloses invention. Claims 1, 2, 5, and 6 also *held* infringed.

4. PATENTS ⟹328—VALIDITY AND INFRINGEMENT—PROCESS OF CONCENTRATING ORES.

The Greenway patent, No. 1,099,699, for a process of concentrating ores, which is a modification of that of patent No. 962,678, was not anticipated, and discloses patentable invention; also *held* infringed.

Buffington, Circuit Judge, dissenting.

Appeals from the District Court of the United States for the District of Delaware; Edward G. Bradford, Judge.

Suit in equity by the Minerals Separation, Limited, against the Miami Copper Company. Decree in part for each party, and both appeal. Reversed on complainant's appeal, and affirmed on defendant's appeal.

For opinion below, see (D. C.) 237 Fed. 609.

Henry D. Williams, William Houston Kenyon, and Lindley M. Garrison, all of New York City, Frederick D. McKenney, of Washing-

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ton, D. C., and Thomas F. Bayard, of Wilmington, Del., for plaintiff.

Walter A. Scott, of Chicago, Ill., Louis Marshall, of New York City, George Gray, of Wilmington, Del., Thomas F. Sheridan, of Chicago, Ill., and John F. Neary, of Wilmington, Del., for defendant.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. These are appeals from a decree of the District Court in an action brought by Minerals Separation, Limited, a corporation of Great Britain, against the Miami Copper Company, a corporation of Delaware, charging infringement of United States Letters Patent No. 835,120, issued to Sulman, Picard and Ballot, November 6, 1906; No. 962,678, issued to Sulman, Greenway and Higgins, June 28, 1910; and No. 1,099.699, issued to H. Greenway, June 9, 1914, and owned by the plaintiff.

Of the claims in suit the court found claims 1 and 12 of the first patent valid and infringed, and claim 9 invalid; claims 1, 2, 5 and 6 of the second patent valid and infringed; and claims 1 to 12 of the third patent invalid. The decree being in parts adverse to both parties, both appealed, presenting for review the same claims, excepting claim 9 of patent No. 835,120, with respect to which the appeal is abandoned.

As both parties are appellants, we shall speak of them as they stood in the court below.

The three patents in suit, to which we shall refer in the order of their issue as first, second and third, are for processes relating to water concentration of ores. They have for their object, stated generally, the separation of metalliferous matter from gangue or barren matter in ore pulp, by means of oils, fatty acids or other substances which have a preferential affinity for metal over gangue. The first patent, while employing the known selective affinity of oil for metal, is based upon a discovery that that affinity is greatest and metal recovery highest when the proportion of oil to ore is relatively least, and upon the disclosure that that property or characteristic may be brought into action and commercially utilized by agitating the ore-bearing pulp until a foam or froth arises to the surface, carrying with it and holding for recovery the extracted metal.

The process of the second patent is distinguished from the process of the first in that the frothing agent is soluble and develops in solution (when agitated to a froth) a selective affinity for metal similar to that of oil, the insoluble frothing agent of the first patent.

The characteristic of the process of the third patent is that concentration may be effected in the cold and without the aid of acid by the admixture of an aromatic hydroxy compound such as phenol or cresol in the place of the insoluble and soluble frothing agents of the other patents and by agitation of the pulp to a froth.

We are aware that this very brief statement of the distinguishing features of the three patents is technically inadequate and will be understood only by those familiar with the history and development

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of the art of ore concentration. As that art has been extensively considered and elaborately discussed by scientists and courts both in this country and abroad in cases in which the invention in suit was involved,[1] we shall not make even a summary of the art or rehearse the history of this litigation as it has progressed in widely separated parts of the world, but shall rather adopt the whole litigious literature of the invention as matter preliminary to the consideration of the particular issues in this case, repeating only so much as may be necessary to throw light on this new chapter.

First Patent.

[1] The invention of the first patent in suit is based upon a discovery of an wholly unexplained phenomenon arising from the agitation of ore pulp containing oil and air in certain proportions. This was a discovery in an art in which it was well known that the elements of oil, air and agitation possessed certain characteristics and produced certain results.

Haynes in British patent No. 488 of 1860 first suggested the use of oil in water concentration of ores by pointing out the affinity which oils have for metallic substances in preference to gangue. Carrie J. Everson showed by Letters Patent No. 348,157, that a small quantity of acid in the pulp aids oil in distinguishing between metal and barren material with which it comes in contact. Elmore (Letters Patent No. 676,679), Kirby (Letters Patent No. 809,959), Froment (British Patent No. 12,778 of 1902), Cattermole (Letters Patent No. 763,260), Sulman and Picard (Letters Patent No. 793,808), and others, employed the known affinity of oil for metal in ore concentration processes by using oil in proportions varying from 2 per cent. to 300 per cent. on the ore and recovering the oil-coated metal particles by causing them to rise to the top or sink to the bottom of the pulp.

Agitation of oil-impregnated pulp was old in the art. It was employed by Haynes, Everson, Cattermole, Froment, and Sulman and Picard. In these processes, agitation was either gentle or thorough, but never great, and while always employed to produce a thorough oiling of the metal, it was used in different degrees for the sole purpose of causing the metal particles to rise or sink.

Air and other gases were also known and were developed in the form of bubbles to supplement the natural buoyancy of oil and to assist

[1] British Ore Concentration Syndicate, Ltd., v. Minerals Separation, Ltd., 25 R. P. C. 741, High Court of Justice, Chancery Division, affirmed after intermediate reversal in the Court of Appeals by the House of Lords in Minerals Separation, Ltd., v. British Ore Concentration Syndicate, Ltd., 27 R. P. C. 33; Ore Concentration Company, Ltd., v. Sulphide Corporation, Ltd., Supreme Court New South Wales, 31 R. P. C. 216, 217; Ore Concentration Company, Ltd., v. Sulphide Corporation, Ltd., 31 R. P. C. 206, Privy Council British Empire; Minerals Separation, Ltd., v. Hyde, 207 Fed. 956 (D. C. Montana); Hyde v. Minerals Separation, Ltd., 214 Fed. 100, 130 C. C. A. 576 (C. C. A. 9th Circuit); Minerals Separation, Ltd., v. Hyde, 242 U. S. 261, 37 Sup. Ct. 82, 61 L. Ed. 286; Minerals Separation, Ltd., v. Miami Copper Co., 237 Fed. 609 (D. C. Delaware).

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the oil-coated particles to the surface. This use of air was disclosed by Froment in 1902 and again by students of the University of California in the California Journal of Technology in 1903, and by Sulman and Picard in the patent referred to (No. 793,808), commonly called the Bubbles Patent.

Thus it may be stated generally that in the prior art, oil was used for its known selective affinity for metal, agitation to mix the oil with the metal, and air to supplement the buoyancy of oil in raising oil-coated metal particles to the surface. To this extent had the art of oil flotation advanced when the patentees entered it, having reached the commercial stage in only two processes, Elmore and Cattermole, representing respectively metal-flotation and metal-sinking processes, and having reached the stage of success in none.

The Elmore process was known as the bulk-oil or oil-buoyancy process. It required from 100 per cent. to 300 per cent. of oil on the ore, that is, from 2,000 to 6,000 pounds of oil to 2,000 pounds of ore, and called for a gentle movement or agitation of pulp in a way that would bring the oil and metal in contact without breaking the oil bulk, and relied for metal recoveries on the buoyancy of the oil (due to the lesser specific gravity of the large volume) to raise and hold on the surface the metal which by affinity it had extracted from the ore. This was an oil-flotation process. It was not successful because the cost of the considerable quantity of oil used and not recovered made its practice commercially prohibitive.

The Cattermole process was just the reverse of Elmore. While this process depended upon the utilization of the same selective affinity of oil for metal, the quantity of oil was relatively small, being from 3 to 6 per cent. on the ore; but the agitation was considerable, having for its object not the retention of the oil in bulk as in Elmore, but its separation and thorough distribution through the pulp, with the object and result of causing the metal particles to be brought together and agglutinated with the metal slimes, forming granules of a size and specific gravity sufficient to cause them to sink, where they were recovered while the gangue was carried off the surface by an up-flow. This was the metal-sinking process. It had a doubtful success in the concentration of copper and zinc ores of high metal content, but like the Elmore process it was impracticable because unprofitable for the concentration of ores of medium and low grades.

It was while the patentees were engaged in developing this process with a mechanical appliance known as a Gabbett Mixer, by which the pulp was agitated, that the discovery of the first patent was made. It was found that when the proportion of oil was reduced below 2 per cent. the agglutination of Cattermole ceased, and metal recoveries ceased also. This so disturbed the theory upon which the patentees were working that they at once embarked on a series of experiments, in which the quantity of oil was progressively reduced from the Cattermole proportion and the agitation varied in intensity and duration. In experiments with oil in proportions just under the Cattermole proportion nothing resulted. The Cattermole concentration was lost and no other concentration was obtained. When in the line of experiments,

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the proportion of oil to ore was reduced to 1.5 per cent., a "float" appeared. At 1.04 per cent. "still more float" appeared. At .32 per cent. the "float vastly increased." At .10 per cent., the float again "vastly increased." It thus developed that in using oil at .10 per cent. or even at .05 per cent. on the ore, and after violently agitating the pulp from two and one-half to ten minutes, there arose to the surface when the pulp was brought to rest a thick froth or foam of oil-coated air bubbles carrying oil-coated metal particles to the extent of about 90 per cent. of the metal content, the foam being sufficiently stable to permit removal and metal recoveries.

This was an entirely new result based upon a phenomenon then unknown and still unexplained. It constituted discovery. It was a discovery that promised what has since been accomplished—a change in the art of oil flotation from laboratory experiments and mill failures to commercial success. Its great value especially in zinc and copper ore concentration met with world-wide recognition. The art immediately adopted it and paid tribute to it, either by yielding to the patents covering it or by challenging them in litigation commensurate in scope and importance with the field of the discovery itself. The grounds upon which the validity of the patents was attacked were, first, that the phenomenon was already known, and second, that the patents disclosed no novel means for reducing it to practical use. With the decision of the Supreme Court sustaining the validity of the patent, the two grounds of attack disappeared, leaving open, however, the question whether the discoverers have wholly covered their discovery by a patent, and if not, then how far have they appropriated it to their exclusive use, within the principle that in its naked sense a discovery is not patentable and can be embraced in and controlled by a patent only when and to the extent that its principle is developed into invention by the disclosure of a medium or means which brings it into practical action. Morton v. New York Eye Infirmary, 5 Blatchf. 116, Fed. Cas. No. 9,865.

The particular medium by which and through which the discoverers brought into practical action and put to practical use the principle of their discovery, is a process disclosed in their patent. The process described by the claims in suit, including the elements we have numbered and the distinguishing features we have italicized, is as follows:

"1. The herein-described process of concentrating ores which consist (1) in mixing the powdered ore with water, (2) adding a small proportion of an oily liquid having a preferential affinity for metalliferous matter (amounting to a fraction of one per cent. on the ore), (3) *agitating* the mixture *until* the oil-coated mineral matter *forms* into a froth, and (4) separating the froth from the remainder by flotation.

"12. The process of concentrating powdered ore which consists in separating the minerals from gangue (1) by coating the minerals with oil in water containing a fraction of one per cent. of oil on the ore, (2) *agitating* the mixture *to cause* the oil-coated mineral *to form* a froth, and (3) separating the froth from the remainder of the mixture."

The claims disclose the process. The specification, as usual, throws light upon the process by distinguishing it from the prior art, describ-

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ing its operation and result, and referring to illustrations of its practice in two apparatus, in one of which agitation and consequent aeration and fomentation are accomplished by mechanical means.

The validity of this patent and of its equivalent abroad has been widely attacked and ultimately sustained. As our task is to interpret the scope of the United States patent we shall concern ourselves only with the decisions of the courts of this country.

The first suit on the patent was brought in the District Court of the United States for the District of Montana. Minerals Separation, Ltd., v. Hyde, 207 Fed. 956. The validity of the patent was attacked on the ground of anticipation by the prior art, but the court held the patent valid and found invention in the novel and useful combination of oil, air and agitation. Minerals Separation, Ltd., v. Hyde, 207 Fed. 956, 961.

The United States Circuit Court of Appeals for the Ninth Circuit, reversing on appeal the decree of the District Court, found the patent invalid, on the ground that its only novelty lay in the reduced quantity of oil, that this was an improvement only in degree and therefore did not involve invention. Hyde v. Minerals Separation, Ltd., 214 Fed. 100, 130 C. C. A. 576.

The case was then removed by certiorari to the Supreme Court of the United States, and while there awaiting hearing, the action at bar was instituted in the District Court of the United States for the District of Delaware. Minerals Separation, Ltd., v. Miami Copper Co. (D. C.) 237 Fed. 609.

In this case the District Court held the patent valid and infringed, finding (in opposition to the Circuit Court of Appeals for the Ninth Circuit) patentable invention in the use of oil in the minute proportion of the patent.

Shortly thereafter the Supreme Court heard argument and entered a decree in Minerals Separation, Ltd., v. Hyde, 242 U. S. 261, 37 Sup. Ct. 83, 61 L. Ed. 286, by which it reversed the decree of the Circuit Court of Appeals for the Ninth Circuit and held the patent valid, finding invention, as we read the opinion, in the co-action of the critical proportion of oil and air effected by "an agitation greater than and different from that which had been resorted to before," resulting in a froth concentrate of economical value.

Following the decree of the Supreme Court in Minerals Separation, Ltd., v. Hyde, this case was argued before us. The decree of the Supreme Court, with its accompanying opinion in the Hyde Case, materially changed the aspect of this case on appeal by contracting, and in a sense expanding, the issues as tried by the District Court. It disposed of the issue of validity, which had been vigorously contested in the court below. But in disposing of that issue upon grounds different from those upon which the District Court based a like judgment, the question of infringement was acutely enlarged. Upon the finding by the District Court that patentable invention resides in the critical proportion of oil, the admitted use of oil in that proportion by the defendant was manifestly controlling in its finding of infringement, although the defense extended to the whole of the defendant's practices. But under the finding by the Supreme Court in the Hyde Case

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that invention resides not alone in the critical proportion of oil but also in air and agitation, we are called upon to construe the patent in the light of that finding and determine whether the defendant's practices of aeration and agitation in connection with its admitted use of the critical proportion of oil, are within or beyond the scope of the patent.

It is to be noted and kept in mind that the Supreme Court did not construe the patent or determine its scope, for it had no occasion to do so. In the case before it, infringement was so clear that it had to be found if the patent was valid. The validity of the patent, therefore, was the only seriously controverted issue before the Supreme Court.

In deciding the issue of validity, the Supreme Court disposed of the prior art as anticipations by reviewing by general classification its processes together with the process of the patent, and in so doing used expressions which the parties have severally employed in support of and in opposition to their respective contentions. The plaintiff maintains that the language of the Supreme Court supports its broad contention, that:

"Whenever the modifying agent of the patent (oil) is used, a person infringes who gets air into the pulp in any fashion and agitates the mixture by any means to a sufficient extent to cause the mineral particles to attach themselves to air bubbles and to rise therewith above the top of the mixture in a collection of bubbles and metal particles, to wit, froth."

The defendant maintains that the agitation, in which the Supreme Court found invention, is agitation produced by mechanical means, and that any one, who, though using the modifying agent of the patent in the critical proportion, introduces air into the pulp otherwise than by beating it in, and who agitates the pulp to a metal-bearing froth by any means other than mechanical, or who otherwise obtains the result without any agitation whatever, is beyond the scope of the patent and escapes infringement.

Considered in the light of what the Supreme Court said and what it did not say, it is clear that the positions of both parties are extreme. The contention of the plaintiff at least omits the very definite limitation of the patent to the results obtained by the use of oil within the described proportions, and also the equally definite disclosure of an agitation in violence and duration greater than before employed, while the defendant misinterprets words of description as words of limitation.

The Supreme Court said that:

"The process of the patent in suit, *as described and practiced*, consists in the use of an amount of oil which is 'critical' and minute as compared with the amount used in prior processes * * * and in so impregnating with air the mass of ore and water used by agitation—'*by beating the air into the mass*' as to cause to rise to the surface of the mass, or pulp, a froth, peculiarly coherent and persistent in character. * * *"

By this expression the defendant maintains that the Supreme Court did not merely repeat testimony describing and showing how the process was practiced, but used the words as their own, and thereby interpreted the patent and limited its scope to the introduction of air into the pulp "by beating the air" into the pulp by the specific mechanical means illustratively shown by the drawings of the patent. We

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do not so interpret this expression. In the first place the patent nowhere uses the words "by beating the air into the mass." Therefore these words, as quoted by the Supreme Court, were not quoted from the patent, but were taken from the testimony of a witness who used them in describing the process as discovered and developed by the patentees. This being so, we do not think these words, as used by the Supreme Court in describing the process, can be construed as a limitation upon the process.

It further appears that the Supreme Court, in distinguishing the process of the patent from processes of other patents relied on as anticipations, found that the lifting force which separates metallic particles of the pulp from other substances resides chiefly "in the buoyancy of the air bubbles introduced into the mixture *by an agitation greater than and different from that which had been resorted to before.*" By this expression the defendant insists that the court explicitly limited the patent to agitation caused by mechanical means, thereby excluding from its scope such agitation by pneumatic means as was used in part in the defendant's practice. As this expression is susceptible of an entirely different meaning, presently to be considered, we find nothing said by the Supreme Court which indicates that it limited the agitation of the patent to agitation by mechanical means.

The defendant further maintains that the Supreme Court gave to the patent a narrow construction when it used these words:

> "While we thus find in favor of the validity of the patent, we cannot agree with the District Court in regarding it valid as to all of the claims in suit. As we have pointed out in this opinion, there were many investigators at work in this field to which the process" of the patent "in suit relates when the patentees came into it, and it was while engaged in study of prior kindred processes that their discovery was made. While the evidence in the case makes it clear that they discovered the final step which converted experiment into solution, 'turned failure into success' (The Barbed Wire Patent, 143 U. S. 275 [12 Sup. Ct. 443, 36 L. Ed. 154]), yet the investigations preceding were so informing that this final step was not a long one, and the patent must be confined to the results obtained by the use of oil within the proportions often described in the testimony and in the claims of the patent as 'critical proportions' amounting to a fraction of 1 per cent. on the ore. * * *"

We are inclined to the opinion that by this expression the court intended a limitation only upon that one feature of the patent to which the expression was addressed. The District Court had held valid certain claims in which the proportion of oil was described simply as "a small quantity," and the Supreme Court in reversing that finding and holding those claims invalid, used the quoted words of limitation in confining the patent to the results obtained by the use of oil in the critical proportions of less than 1 per cent.

From this recital of the litigation of the invention of the first patent it appears that in construing the claims of the patent we are greatly aided by the opinion of the Supreme Court in being told with authoritative finality that the process involves invention and in being shown in which of its elements invention resides; but it is equally clear that in determining the breadth and scope of the claims, we are without the aid of any adjudication in which their scope has been decided or even considered.

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The elements of the patent in which invention is found are oil, air and agitation. These were old in the art, possessing as we have shown, known characteristics and functions, and had they performed in the process of the patent no new or different function or had they produced no new or different result, it is clear they would have anticipated the patent and defeated its claim to invention. But a finding by the Supreme Court that the invention was not anticipated by the old uses and results of these elements is in effect a finding that these elements as used in the process of the patent perform or develop new uses and functions or produce different results. And such we find to be the fact.

The invention, as we have said, is founded upon a discovery. Its patentability depends upon the medium disclosed in the patent by which the force or principle of the discovery is brought into action. Three new uses of old elements are disclosed by the patent, producing a new result. The first relates to oil.

The affinity of oil for metal was known, and though old, was employed in the invention; but that this affinity in a given condition is greatest when its quantity is relatively least or that the affinity increases with the decrease of oil below a given quantity (less than 1 per cent.) is the soul of the discovery and was wholly new. But the discovery did not consist of this alone. The newly discovered phenomenon of the minute quantity of oil is not a chemical phenomenon. Oil in pulp in minute quantity if inert and left alone will do nothing and produce nothing. Something must be done to develop it. The phenomenon not being susceptible of development by chemical change, is developed by physical change of the pulp. As a medium or means of producing that change and creating the condition under which the phenomenon arises, the patentees pointed out—agitation.

The agitation of the patent does several things, old and new. It mixes the oil with the metal of the ore. This is old. Then by its greater intensity and longer duration it stirs the pulp into a froth, developing at once its own new use as a frothing means and still another new function of oil—that of a frothing agent. Both are new.

But froth is made of air as well as oil. Air in bubbles is used for its old function of assisting or escorting metal particles to the surface. But it is also used for the entirely novel purpose of supplying one of the essential elements of froth, froth being the new result intended.

Thus oil is used for its newly discovered characteristics of greater metal affinity when in minute quantity and for its new function as a frothing agent; air for the new purpose of supplying an element of froth; and agitation for its new purpose of bringing the two together and causing them to co-act and produce the new result of a metal-carrying froth. In other words, in so employing these old elements for new purposes, the new things which the patentees told the art are that a radical decrease of oil in conjunction with a radical increase of agitation, develops to its highest potentiality the known affinity of oil for metal and produces a physical change in the pulp in the form of a froth by which metal recoveries are made possible and commercially profitable. The importance of these disclosures, scientifically and commercially, is manifest.

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In approaching a consideration of the scope of the patent, we lay aside those features of the discussion in which the plaintiff demands by broad construction the highest reward for a great contribution to a feeble art, and in which the defendant, contending for a narrow construction, emphasizes the servitude of a great art to a patent monopoly. The rights of an inventor and of an art in an invention are established by law and are not affected by other considerations. Speaking generally, the statutes give an inventor a patent monopoly of his invention to the extent of his patent disclosures, and to that extent the art is servient to his monopoly. Everything touching the invention not disclosed by the patent is free to the art without regard to the value of the inventor's contribution. So the question of law in this case, involving as it does large interests and perhaps far-reaching commercial results, is no different from similar questions constantly appearing in controversies of smaller compass. The question simply is whether certain practices come within the scope of the patent claims. But the question of infringement has grown far beyond the borders of the case and we are really asked both by the plaintiff and defendant to determine the scope of the patent in such terms as will inform the art as well as the owners of the patent the precise field covered by the patent and the extent of the field left free to the art. Such a decision to be useful must of course be predicated upon facts that make it legally possible, for otherwise we encounter the futility and the mischief of construing a patent in general terms and without reference to the occasion or thing which calls for its interpretation. To avoid this error we shall confine ourselves to the precise issues of this case as developed by the evidence, and without regard to other considerations we shall construe the patent with reference to the particular practices which are represented by one party to be within its scope and by the other to be beyond it.

The defendant practiced four processes of ore concentration, using in all the fomenting agent of oil in the critical proportion of the patent. Two processes were practiced before suit was instituted, the third during the progress of the trial, and the fourth after the record had been completed and the trial closed. As the infringement found by the decree relates to the processes appearing in the record, only those processes are before us on appeal.

First Process.

The defendant company owns and operates a large porphyry copper mine at Miami, Arizona. The ore is low grade and of a kind peculiarly responsive in concentration to the process of the patent.

The defendant employed a metallurgical mining engineer to develop and install in its reduction works an oil-flotation concentration plant. The engineer made repeated visits to the mill of a neighboring copper company, a licensee of the plaintiff, studied the process of the patent there in practice, and reproduced it in the mill of the defendant. This was a small plant, of a capacity of but two tons per hour or forty-eight tons per day, operated during the period from December, 1913, to August 5, 1914. It was used evidently more as a testing or experimental

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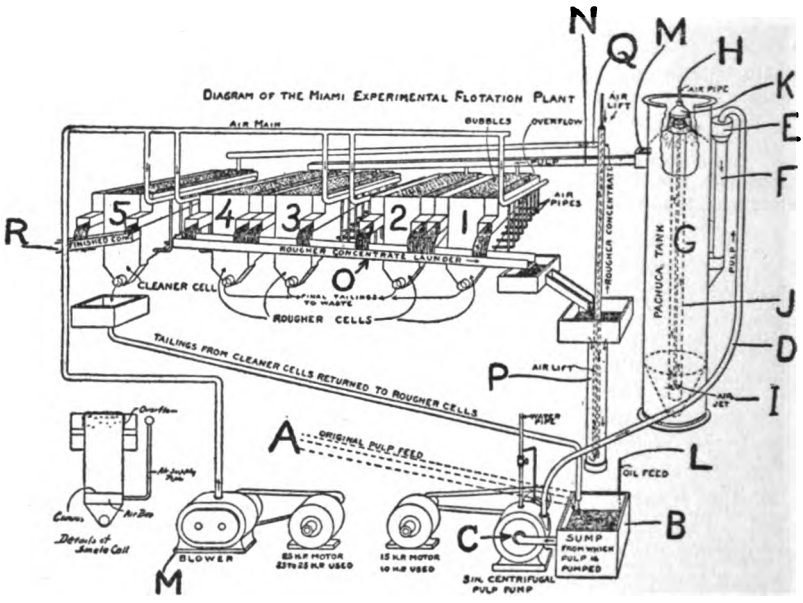
plant for another process then being developed than for commercial purposes.

This constituted the defendant's first process, and as infringement was not disputed, we affirm without discussion that part of the decree holding infringement by this process.

Second Process.

On August 7, 1914, two days after the discontinuance of the first process, the defendant started its second process in a plant which it had constructed during the practice of the first. This plant may best be understood by a diagram furnished by the defendant and by its own detailed description of its operation appearing in its brief:



"The material treated in the flotation plant at Miami is received through the launder or trough *A*, the same bearing the legend 'Original Pulp Feed.' This material is a freely flowing pulp, and flows into the box or tank *B*, upon which the following inscription appears, 'Sump from Which Pulp is Pumped.' The oil or other modifying agent is supplied to the pulp through the pipe *L*, marked 'oil feed.' A centrifugal pump *C* raises the pulp from the sump *B*, and forces it upwards through a pipe *D*, from which the pulp passes into an inlet funnel *E*. The pulp flows from the funnel *E* downward through a pipe *F* and enters the Pachuca tank *G* through the side thereof, as shown in the drawing. A small air pipe *H* extends downwardly from the top of the Pachuca to a point near the bottom thereof, where it delivers an air jet at the point designated *I*. The small air pipe *H* is surrounded by a larger pipe *J*, open at both ends. There is an annular space between the pipes *H* and *J*, and the air entering the lower end of the large pipe *J*, through the pipe *H*, permeates the pulp contained in the pipe *J* with small bubbles, which have the effect of forming a mixture of air and pulp of lower specific gravity than the

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pulp alone. The lightened column of air and pulp in pipe *J* rises and is projected against a conical deflector *K*, and then falls into the main body of the Pachuca. The circulatory movement of the pulp in the Pachuca tank has the effect of thoroughly mixing the oil with the pulp. The pulp flows from the top of the Pachuca tank into a box *M*, whence it is conducted by the launder or trough *N* to the air cells, marked *1*, *2*, *3* and *4*.

"The air cells *1*, *2*, *3* and *4* are similar in construction. The bottom of each cell consists of four plies of canvas, beneath which are eight air compartments, separate and distinct from each other, extending in a series from end to end. The canvas bottom of the machine is inclined, thus making the cell deeper at one end than at the other, and it is for the purpose of getting an even distribution of air that the eight compartments are used, it being obvious that if there were a single air compartment most of the air would escape at the shallow end, where the water pressure is least. Air under slight pressure is supplied to the compartments beneath the cells *1*, *2*, *3*, *4* and *5*, by means of a blower designated by the letter *M* upon the drawing. The air is conducted through a pipe marked 'Air Main' from the blower, and branch air pipes, shown most plainly at the right of cell No. 1, conduct the air to the several compartments beneath the cells. The degree of air pressure necessary is quite slight, and, as stated by Mr. Yerxa, it is necessary to use merely enough pressure to overcome the hydrostatic head of the pulp and to force the air through the permeable medium, that is, the canvas bottom.

"The air so pumped beneath the canvas bottoms of the cells *1*, *2*, *3*, *4* and *5* passes upward through the pores of the canvas into the pulp, and the bubbles rise through the pulp in a manner similar to the rising of the bubbles through a glass of carbonated water."

For the purpose of this discussion, the details of the apparatus and of its operation, may be simplified by referring to its four essential parts: *C*, centrifugal pump; *E*, a break or open space between the pipe of the pump and the Pachuca tank which does not appear on the diagram or in the defendant's account of the operation; *G*, Pachuca tank and its appliances; and *1*, *2*, *3*, *4* and *5*, Callow cells.

Before following the steps or rather the flow of the defendant's process, we should have in mind the theory of its practice. The defendant maintains that the process of the patent is "an *agitation* froth process," that is, a process by which the desired metal-bearing froth is obtained by agitating pulp containing the critical quantity of the frothing agent (oil) "to cause" the froth to arise or "until" a froth is formed. It says that its process, in contradistinction to the process of the patent, is a "*bubbles* process" (containing the same critical quantity of the same frothing agent), by which air, introduced into the pulp from below, passes through the pulp "without any agitation whatever," and arises to the surface in short-lived evanescent metal-bearing bubbles forming a "*foam*." It maintains that by introducing air into the pulp by sub-aeration it produces a foam or froth otherwise than by agitation, that nowhere in the process is there agitation, or that, at most, there is only such agitation as appears in the prior art.

Agitation "to cause" a froth or agitation "until" a froth is formed, being the disclosed means of the patent to produce the phenomenon of the critical quantity of oil, and aeration without agitation being the defendant's claimed means of causing or obtaining the same phenomenon from the same critical proportion of oil in the form of an evanescent foam, the controversy revolves around the elements of aeration and agitation.

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C. Centrifugal pump. The first step in the defendant's process was a centrifugal pump. The defendant claims its one function was that of lifting the pulp (containing oil in the critical proportion of the patent) from one floor of the mill to another, and that in doing so the pulp was neither agitated nor aerated. Opposed to this contention and to the testimony supporting it was testimony that a centrifugal pump drawing air and liquid was the most common type of agitator and aerator of the cyanide art before the Pachuca tank was invented; that in the defendant's apparatus, air was drawn with the liquid into the pump in large quantities; and that in revolving at the rate of 850 revolutions per minute the pulp was violently agitated and measurably aerated.

Reconciling the conflicting testimony as best we may, we are forced to the conclusion that the pump revolving at the rate of 14 revolutions per second could not well avoid agitating the liquid it hoisted; that the agitation was violent; that air was drawn in with the liquid and that to an extent the pulp was aerated within the sense of the agitation of the patent and also by the very mechanical means or its equivalent to which the defendant insists the patent is limited.

E. Break in the circuit. At the point *E* in the pipe between the pump and the Pachuca tank there was a break not appearing in the diagram, permitting the pulp, arising from the pump in its agitated and partially areated state, to drop for a space through the air into a larger pipe, whence it was carried to the Pachuca tank. While this was not a prominent feature of the defendant's process it was of sufficient consequence for the defendant to use it. It had the effect of producing further agitation of the pulp in its fall and further aeration arising from that agitation. It was known as splash agitation, its principle appearing in the early attempts to purify water by aeration. We are satisfied that this constituted agitation and aeration by agitation, and again by mechanical means to which it is sought to limit the patent.

G. Pachuca tank. The pulp twice agitated and aerated was then carried without stopping into a Pachuca tank. This appliance, briefly described, is a tank 18 feet 6 inches high by 4 feet in diameter. Descending in its center are two pipes or columns, one within the other, and in operation compressed air is released through the inner one, sending the fluid in an upward current through the outer one until it strikes with force an overhanging cone or umbrella, which causes it to splash and fall back into the tank, to be subjected again and again to the same revolving movement for a period of time measured by minutes.

The Pachuca tank was taken from the cyanide art, where its one function was agitation and aeration, or rather aeration by agitation. Although agitation is denied by the defendant to be a part of its process, it cannot be seriously contended in the face of the testimony and of the demonstration of the action of the Pachuca tank before us, that the force of compressed air to which the pulp in the tank is subjected, does not cause agitation and very violent agitation.

But the defendant contends that the agitation of the patent is lim-

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ited to agitation occasioned by mechanical means, and as the agitation in the Pachuca tank is caused by pneumatic means, it is beyond the scope of the patent. This contention is based not alone upon the words of the Supreme Court which we have already discussed, but upon the relation of a mechanical device to the discovery of the invention.

It appears that in the experiments in which the discovery was made, the inventors agitated various mixtures by an apparatus known as a Gabbett Mixer, and when they came to reduce their discovery to invention and patent it they illustrated diagrammatically "one form of apparatus suitable for carrying this invention into practice," which included such a mixer. The patentees did not attempt to patent a mechanical means by which their process could be practiced. This is obvious, for the means illustratively shown was a mechanism already patented (No. 444,345, Gabbett Mixer 1891). Nor did they attempt or intend to limit their patent to any mechanical means. Their patent was for a process. But without regard to their intention, did they in fact so limit it? That depends upon what they disclosed by their patent.

By their disclosures they first told the art that a maximum metal recovery could be had from a minimum oil content. Up to the time of this disclosure that was an unknown phenomenon. But this disclosure alone, interesting as it was, would have been valueless to the art, and would not have entitled the discoverers to a patent, until they told how and by what medium that phenomenon could be brought into practical use. Knowing this, they then told the art by the same disclosures that the minute quantity of oil, besides possessing an affinity for metal, was a frothing agent, and when used as such the phenomenon appeared in the froth it developed. But the patentees did not stop with the disclosure that fomentation is the condition out of which the phenomenon arises, but proceeded by further disclosures to tell the art that the way to produce the desired fomentation is by agitating the pulp containing the frothing agent. But agitation of certain kinds for certain purposes was well known, so they went further and told what was not known, namely, that the agitation requisite to fomentation of the character desired, is agitation "greater than and different from that which had been resorted to before," that is, greater than the more or less brisk or vigorous test-tube agitation of early patents and of the Cattermole process, and different from the revolving gentle agitation of the Elmore bulk-oil process, and that it must be violent in character and extended in duration in order that air (the other element of fomentation) might be brought into the fluid and into coaction with the minute quantity of the frothing agent. They thus disclosed not only agitation but the kind of agitation as the medium or means by which the principle of their discovery could be reduced to practice. Agitation was thus made the practical element of their patented process, and by their patent disclosures they told the art that agitation was the secret by which the principle of their discovery could be unlocked and used.

If the same principle can be turned to use and the same results obtained without agitation, or by an agitation which is not the equivalent

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of the agitation of the patent disclosures, we may have another question; but when the critical quantity of oil is used and fomentation is produced by agitation, which in degree of violence and in duration is substantially that of the patent, clearly it is indifferent whether it is attained by mechanical or other means, for the patent deals with agitation as a means of developing the discovery, not with means for developing agitation.

Accepting the teaching of the patent with reference to agitation as a means, the defendant employed it, certainly in three, if not in four, of the steps of its process. In the first and second, agitation was obtained by mechanical means; in the third (the Pachuca tank), by pneumatic means. It is upon this difference in means to produce agitation that the defendant, in part, defends the charge of infringement. But what it sought and what it got by the use of the Pachuca tank was agitation, and that is what the patent told it to get, and we conceive it makes no difference whether it got it by mechanical or pneumatic means. We see no difference between the blow of a paddle and the blow of a blast of air as means to produce agitation. And the defendant itself shows there is no difference between the two in procuring the agitation of the the patent, for by agitating the pulp in the Pachuca tank by pneumatic means with an intensity and for a period of time sufficient to aerate the pulp, the defendant got the precise metal-bearing froth of the patent. This was unintentionally and accidentally shown on one occasion when the Pachuca tank was cut out of the process and the pulp brought to rest. The characteristic froth of the patent arose at once and formed in a collar two feet thick. In view of the agitation to which the pulp had been subjected, we must assume that it was the result of that agitation.

Thus far the defendant did everything that is disclosed by the process of the patent. It used the critical quantity of oil. This is admitted. It agitated the pulp by one means and another with an intensity and for a time sufficient to change the physical character of the pulp, as intended by the patent, and developed in it the quality of producing an air-bearing froth, which it did when permitted to come to rest. But in the practice of the defendant, agitation was not stopped or even arrested in the Pachuca tank. The pulp was carried in circuit without stopping and without abatement of agitation into Callow cells, carrying with it the air content accumulated by the agitation of the centrifugal pump, the air drop and the Pachuca tank.

1, 2, 3, 4, 5. Callow cells. As a last step, the pulp was conveyed into Callow cells. A Callow cell is a rectangular tank with a sloping bottom made of canvas, through the perforations of which compressed air ascends in myriads of air bubbles through the liquid it contains. By this process, the defendant contends it pursued a practice taken from the prior art and entirely outside the scope of the patent.

In this connection much stress has been placed by the defendant upon the prior art, on the theory that as the Supreme Court found the invention not anticipated, all that the prior art contains is open to it without the hazard of infringement. This position is unobjectionable.

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It is clear that if the defendant practiced the process of the patent and obtained a different result, or if it practiced a different process and obtained the same result, it did not infringe. To do this it was free to resort to a practice of the prior art or to a practice new to the art. It chose to rely upon a practice of the prior art, which, though producing the same result in metal recoveries as that of the patent, it maintains differed from it in its steps and means. It was based upon Patent No. 793,808 granted to Sulman and Picard (two of the patentees of the patent in suit), and commonly called the Bubbles Patent. This patent, though it never reached the mill, has been extensively discussed by experts and counsel. Air is introduced into the bottom of a tank similar in shape to that of a Callow cell. Near the bottom is a perforated helical worm or tube, through which, while revolving, air is permitted to escape and ascend in bubbles to the surface. As the pulp is modified by oil (not the critical quantity of the patent) the air bubbles and metal particles are coated with oil, whereupon the oil performs its known affinity for metal and air its known characteristic to ascend and assist the oiled metal to the surface.

While there is a similarity in principle between the mere introduction of air in the Callow cell and in the Bubbles tank, the purpose for which air is injected and the function which air performs after it is injected are altogether different in the two. Before the pulp is put into the Bubbles tank it is agitated for the purpose of mixing the oil and coating the metal particles, and when that is done it is turned into the Bubbles tank where the air bubbles, liberated through the perforations of the coil, attach themselves to and escort the oil-coated metal particles to the surface, where they are carried off by skin flotation. In the Callow cell of the defendant's process (the claimed equivalent of the Bubbles tank) air was used for another purpose. The pulp first agitated to the potentiality of the critical quantity of oil and air of the patent was carried into the Callow cell, and with its elements thus fully developed was subjected to an air blast, which did two things, resulting in a third. First, the air blast further aerated or super-aerated an already fully aerated pulp by driving into it myriads of air bubbles, and second, caused an agitation which while considerable was not violent, resulting in a foam, which persisted so long as air pressure was maintained, and which had a metal-bearing quality and sufficient stability to permit recovery by overflow.

A peculiar feature of this step in the process and upon which the defendant earnestly relies to distinguish it from that of the patent, is, that if the pulp agitation of the Callow cell is arrested by withdrawing the air pressure, the foam immediately subsides and the froth of the patent does not arise as it did when agitation was arrested in the Pachuca tank. This is true. It is equally true that in this fourth step, aeration is direct and is not the result of or caused by agitation. On the contrary, agitation results from aeration, and such agitation, though present in some measure, is not even approximately of the violence and duration of the agitation of the patent. The operation in the Callow cell certainly possesses these distinguishing features

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from operation of the process where aeration is caused by agitation. Emphasizing this difference in its favor, the defendant pressed further and urged that the operation of the Callow cell was not dependent upon the precedent treatment of pulp in the Pachuca tank, and that the same results could be obtained from the Callow cell without such previous agitation and aeration. This assertion is based upon an experiment made by the defendant in the presence of representatives of the plaintiff when the Pachuca tank was cut out of the system and pulp from the centrifugal pump was shunted directly into the Callow cells, with the result that the Callow cells continued to perform their function of supplying air bubbles, agitating the pulp to a degree and forming an overflowing metal-carrying foam. But the metal carried over was not assayed and we do not know what were the commercial results of the test. We know, however, that this was but an experiment and after the experiment had been concluded, the defendant returned immediately to its practice of using the Pachuca tank. Nor are we informed as to what would happen if the centrifugal pump had also been cut out, because whether in the mill or in the laboratory, so far as we have been shown, it appears that *before* the Callow cell (or Bubbles tank) is called upon to perform its task, the pulp is always pre-agitated and pre-aerated in some fashion and to some extent. Even in the demonstrations of the Callow cell and the Bubbles tank made before us in court, the defendant's demonstrator caused the pulp to be violently agitated by a *Gabbett Mixer,* the illustrated means of the patent, for a period of time measured by a stop-watch before it was turned into the cell and tank.

[2] Notwithstanding the defendant's testimony is silent as to what a Callow cell would do to pulp that had not been previously agitated and aerated, and notwithstanding all Callow cell demonstrations before us were made with pre-agitated and pre-aerated pulp, the case for the defendant was largely argued as though its process consisted solely in passing thoroughly mixed but quiescent pulp directly into Callow cells, where it received its first and final aeration without previous or present agitation, resulting in a metal-bearing foam with characteristics different from those of the froth of the patent. We find nothing in the evidence or in the demonstrations which justifies that argument. If the only agitation to which the pulp was subjected (after such agitation as in the prior art was necessary to mix the oil and ore) was the agitation of the Callow cells, we would not say that that agitation amounted to or was the equivalent of the violent agitation of the patent disclosure and constituted infringement; but in the process we are considering and upon which the decree we are reviewing was based, the Callow cells were not the whole process but were merely the last of four distinct parts of the process, the other three being the process of the patent or its fair equivalent. Having used the process of the patent in the first three steps in developing in the pulp the potentiality of the critical quantity of oil and air and in bringing the pulp to the point where, if permitted, it would produce the result of the patent, we feel that the defendant cannot escape infringement by taking an additional step, even though that step if taken alone avoids the patent.

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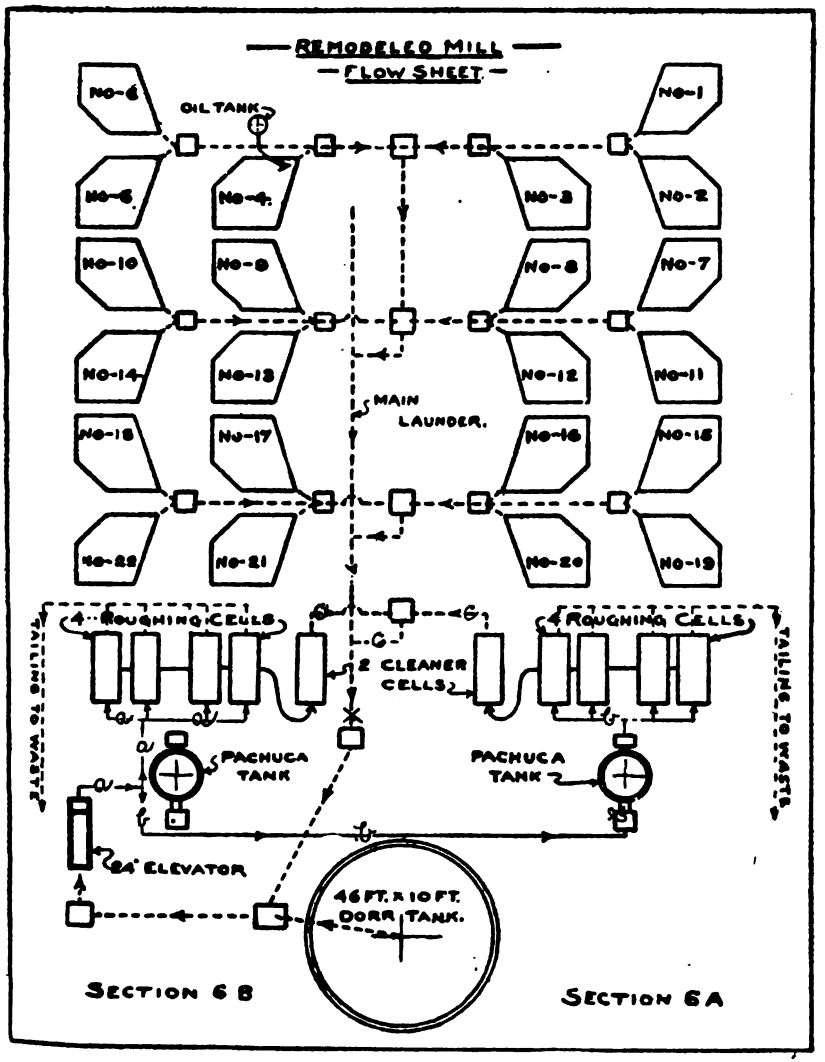
Third Process.

The third process of the defendant was developed and put into practice during the trial and constituted one of the defenses to the charge of infringement. There is little difference between it and the second process. It is shown by the accompanying reproduction of a blue-print of the apparatus in which it was practiced:

BLUE PRINT OF NEW MIAMI MILL.



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The plant is shown to comprise two independent sets of flotation cells, one at the right and the other at the left of the drawing. The flotation cells are designated: "4. Roughing Cells" and "2. Cleaner Cells." Adjoining each group of cells is a Pachuca tank. The operation begins upon the 22 concentrating tables, so numbered upon the drawing. The material rejected by these tables is treated by the flotation process. The flow of pulp in the tables through the launders takes place by gravity until the pulp reaches a bucket elevator, which is the substitute for the centrifugal pump in the second process. When the pulp is raised by the elevator to an upper floor it is divided and flows in equal parts into two Pachuca tanks, thence to the Callow cells, where metal recoveries are obtained by froth overflow.

The value of this process, as a defense, is found in an experiment to which it was subjected. The plant was arranged in two groups of identical members. In the experiment, one group was operated with the Pachuca tank as planned. In the other, the Pachuca tank was cut out and the pulp conveyed directly from the elevator to the cells. The result was no apparent difference in the action of the pulp and little difference in the assays of the metal recoveries, that difference, curiously enough, being in favor of the group in which the Pachuca tank was not used. The evidence of the fact and of the effect of this experiment was not contradicted, except, perhaps, by the defendant itself, by returning at once to its previous practice of using both Pachuca tanks, and in pursuing that practice to a time beyond the trial. This fact places the third process in the position of the second, where we have found that agitation and aeration of the Pachuca tank is the agitation of the patent, and amounts to infringement.

Fourth Process.

The fourth process is not in the record and was not considered by the District Court in reaching the decree now before us on appeal. It was brought to our attention during the argument by counsel, who said that in the process developed by the defendant after the trial, and now practiced, the Pachuca tanks are eliminated, the pulp being delivered directly from the bucket elevators to the Callow cells. While we are loath to omit from our consideration and judgment anything affecting this very important patent and the art to which it relates, we feel, nevertheless, that we cannot consider and adjudge with propriety or authority a process with respect to which the plaintiff has had no opportunity to produce testimony and which was not embraced in the decree we are reviewing.

We find no error in the decree of the District Court holding valid and infringed claims 1 and 12 of the first patent in suit.

Second Patent.

[3] The second patent involved in this suit, No. 962,678,—also for improvements in ore concentration,—was applied for on April 30, 1909, was issued on June 28, 1910, to Sulman, Greenway and Higgins, and has not been judicially passed upon except by the court below.

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Its particular object is "to separate certain constituents of an ore such as metallic sulfids from other constituents such as gangue when the ore is suspended in a liquid such as water."

It is also an air-froth flotation process but differs from the first patent, although both processes may be, and both actually are, employed conjointly. Its essential feature is the use of a mineral-frothing agent in solution, and the method will be best understood by turning to the specification:

"According to this invention the crushed ore is mixed with water containing in solution a small percentage of a mineral-frothing agent (that is of one or more organic substances which enable metallic sulfids to float under conditions hereafter specified) and containing also a small percentage of a suitable acid such as sulfuric acid, and the mixture is thoroughly agitated; a gas is liberated in, generated in, or effectively introduced into the mixture and the ore particles come in contact with the gas and the result is that metallic sulfid particles float to the surface in the form of a froth or scum, and can thereafter be separated by any well known means. Among the organic substances which in solution we have found suitable for use as mineral-frothing agents with certain ores are amyl acetate and other esters; phenol and its homologues; benzoic, valerianic and lactic acids; acetones and other ketones such as camphor. In some cases a mixture of two such mineral-frothing agents gives a better result than a single agent. The above mentioned mineral-frothing agents are all more or less effective in the presence of an acid such as sulfuric acid and are given as types but are not intended to form an exhaustive list of suitable organic substances which may be used in this manner and for these objects. On the other hand there are many organic compounds which in solution will not effect the result described, such as some sugars, dextrin, saponin, albumen, ox gall, etc., and a simple test is required in the case of varying ores or materials to determine which organic compound is most suitable.

"The following is an example of one method of carrying this invention into effect: Water containing a small percentage of sulfuric acid in solution, say from .2 per cent. to 0.5 per cent., and containing in solution a small quantity say 0.1 per cent. of one of the foregoing organic substances (say amyl acetate) is, with finely pulverized ore, introduced into an agitating apparatus, in the proportion of say 3 parts by weight of water to 1 part by weight of ore. The agitation is carried out in such a way as thoroughly to disseminate air through the mixture which is thereafter discharged into a spitzkasten. It is found that a coherent froth or scum floats on the surface of the water in the spitzkasten. This froth contains a large proportion of the metallic sulfids but is substantially free from gangue. Any well known means may be employed for collecting the froth. If desired the tailings can be re-treated by the same process with or without the addition of fresh quantities of the organic materials referred to. The action may in some instances be improved by heating the mixture. * * *

"Several agitation vessels are placed in series. These may conveniently be large vats separated by partitions having openings at the bottom so that the liquid may pass from one to another. Each vessel is provided with a rotatable stirrer which is conveniently of the form shown in the drawing. Each stirrer is carried on a spindle rotated at a high speed by any convenient means. Crushed ore or similar finely divided mineral is fed into the first vessel through any convenient ore-feeding device, * * * and water is also fed into the vessel. A small proportion of acid, such as sulfuric acid, may be introduced into the water from the feeding vessel, and a small proportion of one or more other soluble substances which enable metallic sulfids to be floated by air under the conditions hereafter specified, may be introduced from the feeding vessel. The liquid containing ore in suspension is vigorously agitated in the agitation-vessels and escapes at the outlet highly charged with air.

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"A settling apparatus consisting of one or more spitzkasten is placed immediately at the outlet from the agitation apparatus. As shown in the drawing, the spitzkasten has a launder to receive the floating froth which passes away through the outlet. The liquid and the sunken material pass out through the outlet at the bottom of the spitzkasten. The level of the liquid in the spitzkasten is slightly above the lip. Within the spitzkasten is placed an inclined baffle or guide-plate, which may be made adjustable, extending upward from below the inlet and arranged to direct the stream of ore-particles and air-bubbles toward the surface of the liquid in the spitzkasten.

"Hitherto many proposals have been made for the wet concentration of ores involving the addition to the liquid in which the ore is suspended of an immiscible liquid. For example in the patent granted to Cattermole, Sulman & Picard, United States No. 777,274, dated December 13, 1904, is described a process of ore concentration in which metalliferous particles were coated with a thin film of a fatty or resin acid or a phenol or a cresol by introducing the alkaline compounds of these materials into an acid liquid whereby these materials were liberated in an immiscible or insoluble condition and adhered to the mineral particles. In another known process the powdered ore suspended in water, preferably acidified, is mechanically brought to the surface whereby the particles are exposed to the air and it is found that the metalliferous particles float on the surface while the gangue sinks. In this known process the selective flotation of the metalliferous particles is not due to the metalliferous particles being coated with a selective agent, that is to say, the selective flotation is due to the properties of the metalliferous particles themselves when exposed to air or other gas and brought onto the edge or surface of water preferably acidified.

"The present process differs from the two before mentioned types and from other known concentration processes by the introduction into the acidified ore pulp of a small quantity of a mineral-frothing agent; i. e., an organic compound in solution of the kind above referred to and by the fact that the metalliferous particles are brought to the surface in the form of a froth or scum not by mechanical means but by the attachment of air or other gas bubbles thereto.

"In the frothing processes hitherto known the substances used to secure the formation of a mineral-bearing froth has been oil or an oily liquid immiscible with water. According to this invention the mineral-frothing agent consists of an organic compound contained in solution in the acidified water.

"We do not confine ourselves to the proportions above given, the best proportion can in each case be easily determined by trial.

"It is well known that certain of the organic substances we have referred to are not soluble in water in all proportions and that if used in excess might partly remain insoluble in the acidified water and might become mechanically affixed to the metalliferous particles of the ore. We disclaim any such use of these substances and only claim them in such amount as will enable them to dissolve in the acidified water."

The claims in issue are the following:

"1. The herein described process of concentrating ores which consists in mixing the powdered ore with water containing in solution a small quantity of a mineral-frothing agent, agitating the mixture to form a froth and separating the froth.

"2. The herein described process of concentrating ores which consists in mixing the powdered ore with water containing in solution a small quantity of an organic mineral-frothing agent, agitating the mixture to form a froth and separating the froth."

"5. The herein described process of concentrating ores which consists in mixing the powdered ore with water containing in solution a small quantity of a mineral-frothing agent, agitating the mixture and beating air into it in a finely divided state so as to form froth and separating the froth.

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"6. The herein described process of concentrating ores which consists in mixing the powdered ore with water containing in solution a small quantity of an organic mineral-frothing agent, agitating the mixture and beating air into it in a finely divided state so as to form a froth and separating the froth."

The difference between the two patents may be shortly stated to be this: The first process rests upon the use in very small quantity of an oily substance that does not dissolve in water, coupled with agitation of the pulp, and this succeeds in producing a special froth that is remarkably effective in recovering the minute particles of ore. The second process does not employ oil, or an undissolvable substance; on the contrary, the "mineral-frothing agent" must be in solution, and ex vi termini must therefore be dissolvable. The specification disclaims the use of so large a quantity that part of it remains undissolved. The "mineral-frothing agent" is further limited by describing it as "one or more organic substances which enable metallic sulfids to float under conditions hereinafter specified"; and, as this general statement does not convey specific information, the patentees give several examples of organic substances that are found to be suitable for use in solution. In passing we may note that claims 1 and 5 are broad enough to cover inorganic frothing agents also, but as no such agent is yet known this feature need not now be considered. Just how or why this solution with the needful agitation produces the froth, is not certainly known; but the fact is, that (to use the language of the brief):

"* * * Its effect [is] to produce a similar action of air bubbles in the attraction of metallic particles, a similar levitation of the metallic particles, a similar persistence of the bubbles, a similar reliable adherence of the air bubbles to the metallic particles, and a similar capacity for final separation of the metallic particles by their overflow, still in attachment to air bubbles, at the top of a vessel containing the pulp."

An observable difference in effect is that the froth of the second patent is composed of bubbles much smaller than the bubbles of the oil process.

We may also note that while the addition of an acid to the mineral-frothing agent is described as part of the process, this was at that time a usual practice, and in any event is not an element in the claims now in issue. The agitation is to be thorough, but in the same connection the means for bringing this about is described in terms that are wide and inclusive. The air or other gas is to be "liberated in, generated in, or effectively introduced into, the mixture," in order that the ore particles may come into contact with the gas and as a result may float to the surface in the form of a froth or scum which can be separated afterward by any well known means. The object of introducing the air or other gas into the mixture is such agitation of the pulp as will produce the desired froth, but the claims are not confined to a particular device or a particular degree of agitation. But of course, the agitation must be thorough and it must be effective, these being matters for experiment but always with the ultimate object of bringing the sulphid particles to the surface and holding them there in the grasp of a froth.

We do not find it necessary to discuss the question of validity; our

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conclusion is, that the patent discloses invention and has not been anticipated. As in the case of the oil process, the patentees seem to have taken "the final step which converted experiment into solution, turned failure into success." Minerals Separation Co. v. Hyde, 242 U. S. 261, 37 Sup. Ct. 82, 61 L. Ed. 286. And we find nothing in the prior art that can be held to anticipate. The real question upon this patent also is the question of infringement, and here as well as there the decision turns upon the kind and degree of agitation employed by the defendant. We need not dwell upon the subject, for as the defendant used both processes conjointly it is evident that what has been said about the infringing agitation in the oil process must also apply to the same agitation when considered in reference to the second process. There is this difference, however; as pointed out above, the agitation of the second process is so described as to cover expressly a wider range of means and degree than is expressly covered by the first process, and therefore needs less aid, if any, from the doctrine of equivalents. For the reasons given in discussing the oil patent, we think the defendant's practices there described infringe also the process now under consideration.

Third Patent.

[4] The third patent involved in this suit, No. 1,099,699,—also for improvements in ore concentration,—was applied for on June 30, 1911, was issued on June 9, 1914, to Henry Howard Greenway, and has not been judicially passed upon except by the court below. As stated in the specification, its process is "a modification of the invention described in U. S. Patent to H. L. Sulman, A. H. Higgins and myself, No. 962,678, granted June 28, 1910," which is the second patent here in suit. Greenway's particular object was "to separate certain constituents of the ore such as copper sulfides (for example in the form of copper pyrites or metallic copper natural or reduced) from other constituents, such as gangue where the ore is suspended in a liquid such as water." After describing the process of No. 962,678, as one "applicable generally to the recovery of metallic sulfides and like floatable metalliferous matter and in case of lead and zinc sulfides to which the process has been largely applied" and stating that in such process "it is necessary for efficient working that the pulp should be lightly acidified, and in most cases in practice the pulp is heated," the patentee disclosed his discovery, namely, that both acids and heat can be dispensed with, saying that "it is now found that with copper ore such as an ore containing copper pyrites effective separation is obtained in the cold without the use of acid by employing as mineral frothing agents, aromatic hydroxy compounds such as phenol, cresol, or mixtures containing the same." Upon this disclosure the claims here in issue were granted, illustrative of which claim 12 is for "a process of concentrating ores which consists in mixing a powdered ore containing copper with neutral water containing in solution a minute quantity of cresol, agitating the mixture in the cold to form a froth and separating the froth." In the court below the patent was held invalid and agreeing as we do with

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the conclusion reached by it in reference to the first and second patents, we are the more inclined to follow its decree in reference to the third patent. But an examination of the proofs satisfies us that the process disclosed in this patent was a substantial departure from processes of the prior art. The heating of water is a matter of large moment in large operations, and the use of acid is a matter of constant and considerable expense. By wholly dispensing with both by the use of a minute quantity of hydroxy compounds, the patentee has disclosed an original and novel plan which has broadened and made more simple the agitation process of air flotation. The length of this opinion, rendered necessary in the full discussion of the first patent, is the sufficient warrant for our refraining from a detail discussion of the proofs and reasons which lead to our conclusion as to the novelty and inventive character of Greenway's discovery, and we therefore limit ourselves to stating that after full consideration we have reached the conclusion that his patent is valid, and, for the reasons stated in discussing the first patent, is infringed by the defendant.

It is ordered that the part of the decree of the District Court holding valid and infringed claims 1 and 12, and invalid claim 9, of Letters Patent No. 835,120, and holding valid and infringed claims 1, 2, 5 and 6 of Letters Patent No. 962,678, be affirmed, and that the part holding invalid claims 1 to 12 of Letters Patent No. 1,099,699, be reversed, and that a decree in accordance with this opinion be entered.

BUFFINGTON, Circuit Judge (dissenting). Putting aside all minor incidents, this case in my judgment, involves one broad, basic and far-reaching question, and that is whether any and all advance and improvement in the sphere of air flotation in mineral recovery for the next few years shall be subjected to what will practically be a blanket claim for any use of air as a flotation agency.

The claim which we are asked to construe and apply is for:

"The *herein*-described process of concentrating ores, which consists in mixing the powdered ore with water, adding a small proportion of an oily liquid having a preferential affinity for metalliferous matter (amounting to a fraction of one per cent. on the ore), agitating the mixture until the oil-coated mineral matter forms into a froth, and separating the froth from the remainder by flotation."

I say, putting aside all minor incidents, for it is perfectly clear that if all kinds of air flotation and all kinds and degrees of agitation are covered by this claim, the infringement of the defendants is self-evident by their use of compressed air which produces some agitation and causes air flotation. To my mind, and for reasons I shall now discuss this claim should not be awarded this sweeping scope which will paralyze the subsequent development of a great art.

Now, if any broad right to monopolize all air flotation with a limited use of oil but an unlimited use of agitation exists, it arises by virtue of a contract made between these patentees and the government; and that contract is embodied in the claim of the patentees, made by them and conceded by the government, the other of the contracting parties,

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and the consideration for that claim is the required statutory disclosure made by the patentees—

"* * * of the manner and process of making, constructing, compounding, and using it, in such full, clear, concise and exact terms as to *enable* any person skilled in the art. * * * to make, construct, compound, and use the same, * * * and he shall particularly *point out* and *distinctly claim* the part, improvement, or combination which he claims as his invention or discovery."

Turning now to the patent itself, which has been held valid and described by the Supreme Court as "patentable, as new and original as it has been found useful and economical," let us inquire, first, what was the new thing disclosed, for therein we have the consideration for the claim; and, second, what claim was allowed in consideration of such disclosure. This line of approach is to my mind imperative, first, because while an invention may be broader than a claim, a claim can never be broader than an invention. Finding from this claim that it concerns two things, oil and agitation, we must necessarily turn to the specification and there ascertain what was the new disclosure as to oil and agitation. In substance, it was the disclosure of a process in which a hitherto unused minimum of oil and a hitherto unused maximum of agitation were used. Each of these disclosures was summed up by the Supreme Court in these words:

"The process of the patent in suit, as described and practiced, consists in the use of an amount of oil which is 'critical,' and minute as compared with the amount used in prior processes, 'amounting to a fraction of one per cent. on the ore,' and in so *impregnating with air* the mass of ore and water used by agitation—'*by beating the air into the mass*'—as to cause to rise to the surface of the mass, or pulp, a froth, peculiarly coherent and persistent in character, which is composed of air bubbles with only a trace of oil in them, which carry in mechanical suspension a very high percentage of the metal and metalliferous particles of ore which were contained in the mass of crushed ore subjected to treatment. This froth can be removed and the metal recovered by processes with which the patent is not concerned."

It will thus be seen that, first, the quantity of oil; secondly, the character of agitation; and, thirdly, the resultant froth—constituted the disclosure. Apart from the authoritative statement of the Supreme Court as to what was the invention of these patentees, which of course controls us, it is clear, both from the proofs, the physical facts, and a general knowledge of the art, that such was the case, and that this discovery is bottomed on agitation—the new kind of agitation disclosed—which made possible new extension of well-known properties and capacities of oil into fields oil had not reached by any previous methods of agitation. And it follows, if agitation of maximum character is the dominating factor that made possible the use of a minimum of oil, that claims which specify the use of oil and of agitation must not be read in a way that ignores the new and disclosed agitation, which was not only the only specific agitation, but the only generic agitation the patentees disclosed. For it is perfectly clear that, if the art of air flotation to-day had stopped where the disclosure of this specification left it, the only method of air flotation would be

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the agitation disclosed in the patent. The specification does not purport to disclose or to make use of any newly discovered property of oil. Let that fact be clearly understood. That oil had three qualities was well known prior to this patent—first, that oil had an affinity for metal particles; secondly, that the oil covering the metal was of infinitesimal thinness; and, third, that oil has no affinity for and will not coat gangue. Such being the known action of oil, viz. its affinity and its capacity for thus thinly coating it, and for not coating gangue, it is manifest that whenever oil, gangue, and metal particles are mixed only a minute quantity of oil was needed to coat and actually did coat the mineral particles. The larger quantities of oil used were not needed or used to coat, but to float, the minerals. These facts are proved by the testimony of Sulman, hereafter quoted and alluded to in the House of Lords opinion, referred to later as an agitation which "assists the process of minute quantities of oil reaching minute particles of metal." But while the small quantity of oil used as a metal covering was a fact, the significance of that fact was not recognized in the preceding practice, for the manifest reason that in such art there was no use of oil alone for metal-covering purposes, but it was used for the double purpose—first, of oil covering; and, second, oil flotation. When, therefore, the patentees disclosed a process in which the oil necessary for flotation was dispensed with, the requirement of a small amount of oil for purely coating purposes became at once apparent and assumed a new significance. This was referred to by the Supreme Court when, in distinguishing it from the prior art, it said:

"The small amount of oil used makes it clear that the lifting force which separates the metallic particles of the pulp from the other substances of it is not to be found principally in the buoyancy of the oil used, as was the case in prior processes," etc.

From these considerations it will be seen that oil required and used for covering or coating the mineral particles, was precisely the same in quantity and function in prior practice and the practice of this patent. But what did happen was that the violence and duration of the agitation brought more particles into contact with oil than when the agitation was less violent. What, then, was the disclosure? This is clearly shown by the patentees in their specifications, where they show the *nature of their improvement* by contrast with the prior practices of the Cattermole patents. These proofs show that the present discovery was made while working on the process disclosed by Cattermole and the specification recites its relation to Cattermole. Turning, therefore, for information to Cattermole's patents, I find Cattermole's process was one where oil was used for the double purpose, viz.: First, such small quantity as was necessary for metal particle covering; and, second, such large quantity as was necessary for metal particle flotation. I say "for metal particle flotation" advisedly, for, while the process finally ended in the metal particles finding their way to the bottom and the gangue to the top, yet, as a necessary precedent step to making the metal particles go to the bottom, they were first floated upward, so as to enable them to *there* nucleate or agglomerate in such

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numbers that their combined weight overcame the buoyant capacity of the oil and they sank to the bottom of the vessel. These several actions are set forth by Cattermole, as follows:

"The invention depends upon the application of the following facts: First, when a mixture of powdered metalliferous matter and gangue is treated with oil suspended in water—that is to say, in emulsion—*the oil has more or less selective action and will coat the particles of metalliferous matter in preference to the particles of gangue*, while the particles of gangue will be wetted by the water; second, if the water which is mixed with the oil is acidulated with mineral, fatty, or other acid the *selective action of the oil will thereby* be rendered more marked and decisive; third, if the proportion of oil is kept within reasonably low limits (differing in different cases, according to the nature of the mineral to be treated and the consistency and nature of the oil) and if the mixture of water, oil, metalliferous particles, and gangue be *thoroughly agitated* the metalliferous particles which have become coated with oil will adhere together and form granules, which granules, partly by reason of gravity and partly on account of their bulk, as compared with the individual grains of gangue, will offer ready means for separation in an upcurrent separator, a jig, or other similar appliance."

At this point it should be noted that as the patentees, in order to explain their disclosure, by reference make the Cattermole patent part of their specification, as the agitation used by the patentees was a step in the Cattermole process, and the Supreme Court found the patentees used and disclosed "an agitation greater than and different from that which had been resorted to before," and also that "the extent of the agitation of the mass had been increased as the experiments proceeded until the series of the Gabbett mixers, fitted with the usual baffles, were speeded at from 1,000 to 1,100 revolutions per minute," an inquiry into the character of the new kind of agitation used and disclosed by the patentees becomes essential to a due understanding of the disclosure made. As recognized and stated by the Supreme Court, this agitation consisted in the patentees speeding up a Gabbett mixer to 1,000 to 1,100 revolutions per minute. The extent of the agitation of the mass had been increased as the experiments proceeded until, as stated by that court, the "series of Gabbett mixers, fitted with the usual baffles, were speeded at from 1,000 to 1,100 revolutions per minute." It is apparent that this tremendous agitation speed through a mushy substance like pulp could only be reached by some special appliance impelled by powerful mechanism, since no ordinary paddle mechanism could stand the strain and furnish the power to meet such a requirement. We accordingly find that this was done by the patentees speeding up to hitherto unused speed, the device known and used in Cattermole's process. Instead of seeking to move the whole pulp mass by rotating paddle pressure on the whole mass—a thing which, owing to the length of the paddle required, would be impossible —Gabbett, as shown by his patent No. 444,345, segregated a part of the pulp. This segregated part alone he moved by paddles, and thereby set up a centrifugal force in the pulp in such segregated section, and thus made the centrifugally moving pulp itself the agency for moving the pulp on the outside of this inner dividing vessel. His device was built in two forms, one of which expelled the pulp at the top and the other at the bottom. Referring to the top expelling device,

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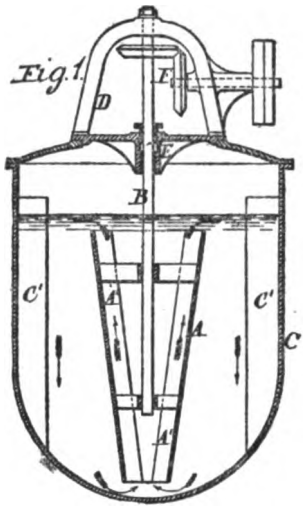
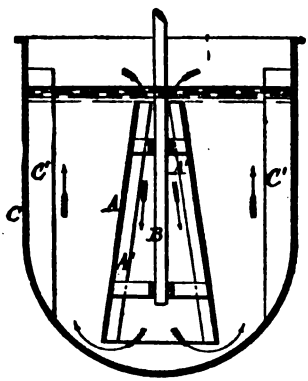
shown by Figure 1, which, as we shall hereafter see, these patentees necessarily declined to use, its operation is as follows:

"*A* is a conical shell, having internal ribs A^2 and mounted on a shaft *B*, by which it is suspended within the vessel or tank *C*, containing the liquid to be acted upon, the shaft being carried at its upper end by a bracket *D* and guided by a bush or stuffing-box *E* on the cover of the vessel *C*. Assuming this vessel to be charged with liquid to the level indicated and the shell *A* to be rotated by suitable gearing, such as indicated at *F*, then the body of liquid within the shell being carried round with the same by means of the ribs *A'* the centrifugal force will cause the liquid to rise along the inclined inner surface of the shell and to be ejected into the surrounding liquid when arriving at the upper edge thereof, while at the same time the pressure of the surrounding column of liquid in the vessel *C* will cause fresh quantities of liquid to enter the lower end of the shell *A* to make good the quantity discharged at the top. Thus a continuous circulation and consequent mixing of the liquid will be effected, as indicated by the arrows."



That is, the machine discharged at the top. Its paddles being submerged in the segregated pulp, it could not beat in air. But neither Cattermole, nor the patentees, who adopted Cattermole, used the top *outlet* type of Gabbett's device above described, but did use the other or top *inlet* type shown in Figure 9, although both moved the pulp in the same way, but in opposite directions. Selecting the top inlet or cone type shown in Figure 9 of Gabbett's two forms, although both machines and agitators were, with the exception named, counterparts, there was a functional advantage in the top inlet type used which was vital to the working of the present patentees' process. And that there was a functional disadvantage in the top outlet type which would have been fatal to the working of their patent will, for reasons hereafter stated, be made clear. The only point now made is that the agitation, and the only agitation which the patentees disclosed as embodying the agitation of their process, was an agitation of one of two particular kinds, namely, one where they utilized their agitation power on a small zone of segregated pulp and where, for functional reasons, as we shall hereafter see, they applied such agitation to this segregated pulp as it was traveling in one direction; that is, downwardly. At this point we recall, as

Fig. 9.



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before stated, that Cattermole's object was to nucleate or agglomerate into a mass, the individual, oil-coated mineral particles, or, as summarized by the Supreme Court, "agglomerating the oil-coated concentrate into granules heavier than water, so that they will sink to the bottom of the containing vessel." As stated in the patent, "the more oil is used, the larger, softer, and less numerous the granules." It was in the use and experimentation of this process that the discovery of the patent in suit was made, and these experiments were duly reported (see volume 4, page 22 and following) from time to time. From these reports it will be seen that the agitator used was of the cone-shape, upper-intake type already described and shown in Figure 9. By March, 1903, they found the value of both violent and protracted agitation, and that such protracted and violent agitation was effective to coat the mineral particles with oil:

"Somewhat *violent* agitation is now required for a *few minutes*; the time being *dependent* upon the *efficiency* of the agitation, and varying from two to five or eight minutes, *whereby* the oil is released from the gangue and *attaches itself exclusively to the mineral.*"

Later, that is, in March, 1904, when a speed of 988 cone revolutions was reached and the effect of agitation effecting air-flotation was noted, where under the head of "Flotation Factor Used," it was said:

"* * * The coarse sands, when passing through the last two mixers, were allowed to be *beaten well with air* by keeping the liquor low in the mixers *and* using *fast agitation*, with baffles in. The concentrates were then found to be floated *up* in the outcast if only a general up current were used."

The underscoring of the words "and" and "up" and the phrase "beaten well with air" and "fast agitation" show that the significance of violent agitation and the entraining of air was in the path of experimentation following the basic feature of the subsequent disclosure of the specification. In March, 1905, under the head "Influence of Peripheral Velocity of Cone"—and it must not be overlooked that "cone" was the word which described the inlet top (Fig. 9) of the Gabbett mixer—it was said:

"An increase in the peripheral velocity of the *cone* causes a decrease in the time required for granulation, a point being reached after which this decrease is slight."

From this entry it will be seen that increase of agitation was still regarded as and was the factor which was leading toward the discovery afterwards made and disclosed in the specification. In the next report both the speed and the type of Gabbett's agitation is again emphasized by contrasting—

First. The low speed of the Gabbett as useless.

Second. The Gabbett *cone* mixer alone and with baffles added as an additional agitation agency.

Third. The inability of a centrifugal pump speeded higher than a Gabbett mixer to furnish the agitation requisite.

These points are all outlined in said report as follows:

"*The influence of the speed and type of agitation* becomes a factor of great importance to our recent experiments. Speeds of rotation (with a small Gabbett) varying from 3 to 500 revolutions per minute, *proved almost useless.*"

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This shows the necessity of high speed agitation.

Continuing, the report said:

"We then made a series of baffles which were placed in the Gabbett and which were 'solid'; i. e., they occupied the *greater free space* of the Gabbett vessel from the glass sides up nearly to the working surface of the cone. They were found to be disadvantageous as they gave *too violent* agitation, and set up large eddy currents in front of each baffle, greatly reducing rotation speed of the liquor in the Gabbett and adding *water friction* to such an extent to the rotating cone, that the power required to drive the latter was more than doubled. On replacing these solid baffles by the *ordinary type of thin rod baffles*, the granulation period was much improved, and the power consumed in driving the cone fell again to the normal."

This, to our minds, shows that, although the baffles increased the agitation, they precluded the kind or quantity of agitation desired. Manifestly the stoppage and delay of the pulp in eddies caused by the baffles stopped the steady and more frequent passage of the pulp through the cone, and this lessened the amount of agitation in the segregated zone where the air was beaten in.

Continuing, the report adds:

"We have also carried out a series of experiments with a small centrifugal pump in place of a Gabbett, to determine whether this gives a better form of agitation than the cone. * * * The following figures were obtained by Mr. Leechman yesterday in comparison with the Gabbett, and show the latter to be distinctly preferable to the centrifugal pump experiments. We may say the centrifugal pump used was only a small one, having about a 4½ to 5 inch chamber, but it was speeded up to about *1,200 revolutions per minute. The pump therefore had a considerably higher peripheral speed than* the Gabbett used in parallel tests."

From this it will be seen that by a process of elimination it was becoming evident that the agitation desired was only obtainable on a *cone* or *top outlet* Gabbett mixer, and that the violent agitation by solid baffles and by the higher speed of a centrifugal pump were both objectionable.

In the light of subsequent events, it is quite evident why this was the case. In the first place, the top inlet or cone Gabbett mixer, by the rapidity of revolution formed a hollow air chamber around the shaft, into which air was drawn down and was there beaten by the paddles into and aerated the pulp. It is also clear that if solid baffles were used on the sides of the outer chamber, the rapid flow of the pulp would be measurably stopped and it could not pass as often through the cone, and therefore was not subjected to as much air beating as when the baffles were not used, as manifestly all the air beating in took place in the cone. And lastly, while in the Gabbett mixer the revolving paddles in the cone were able to strike and beat the air into the surrounding pulp, it is evident the blades of the centrifugal pump, *being necessarily wholly immersed in pulp,* had no contact with air or an opportunity to beat air in. In other words, by its blade submerging, the centrifugal pump had no more power or opportunity to beat air into the blade-enveloping pump than would have been the case had the paddle blades of a Gabbett mixer with a *top outlet* (see Figure 1), whose blades would also be wholly immersed in the outflowing stream, been used.

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It will here be noted that as the centrifugal pump was the sole form of agitation used in this particular stage of the experiments, and, as it was discarded by the experimenters, that, tested by the acts of these patentees, no logical grounds existed for their counsel now planting themselves on the position that the pulp lift of a centrifugal pump is the air agitation of their disclosure and claim.

In the next report, March 16th, under the head "Influence of the Percentage of Oil," we find the effect of oil reduction is noted:

"The effect of diminishing the percentage of oleic acid is to alter the type of oiling; the higher percentages producing granules. and the lower froth. Six per cent. of the oleic acid on the mineral is sufficient to form good granules without much froth. * * * 0.62 per cent. oleic acid on the mineral is insufficient to form any granules, and nearly the whole of the mineral comes to the surface, on stopping the cone, as froth."

It will thus be seen that it was agitation, and agitation of a selected type and speed, that gradually led up to the May 3, 1905, report, where the invention was definitely recorded. And when this was done it was accredited to the agitation indicated. That report says:

"We beg to hand you herewith a statement of the new method of oil concentration which we have been engaged in investigating and working out in detail, for the purpose of your forwarding to Mr. Courtney and his staff in Australia. It will be best to start with a short statement of the principle on which the process depends. In determining the lowest limit of oleic acid which could be employed in granulating, it was found that granulation practically stopped at a range of about 0.5 per cent. of oleic acid on the mineral (60 mesh Broken Hill), in an acid circuit somewhat below 1 per cent. in strength. A certain amount of black mineral froth was, however, noticed as a result. On successively decreasing the amount of oleic acid *below* 0.5 per cent. it was found that, whereas granulation ceased, there was a growth in the amount of mineral float-froth under these conditions, and that the production of such float-froth appeared to reach a maximum when about 0.1 per cent. of oleic acid on mineral was used. This froth on collection was found to consist of oiled mineral slimes *mechanically holding more or less coarse* (oiled) mineral particles, the froth carrying between 70 to 80 per cent. of the total mineral present in the charge. * * * The froth produced is not due to any action of the acid circuit upon traces of calcite present in the ore: i. e., not to the liberation of any gas in the charge by means of the dilute acid employed in the circuit. It has been located, on the contrary, *to the air introduced by the Gabbett cone during agitation, the air attaching itself to the oiled mineral slimes and to a large proportion of the coarse mineral particles, although both these materials can only be coated with an infinitesimal amount of oil;* i. e., oleic acid. That the formation of froth is due to *air inclusions during the agitation*, and not to carbonic acid or sulphuretted hydrogen is proved by the following experiences: * * * The plant consists of a series of Gabbett mixers fitted with the usual baffles, and speeded at from 1,000 to 1,100 revolutions per minute as regards the cone. These Gabbett mixers are identical in every respect with those used for the original Cattermole process. * * * The operations are therefore summarized as follows: *Gabbett agitation* in the usual way with 0.1 per cent. oleic acid"

—thus themselves coupling with their invention at its birth the name of Gabbett and Gabbett agitation, which they now seek to avoid.

This terse and complete summary of the discovery in "*Gabbett agitation* in the usual way with 0.1 per cent. oleic acid" is also the summary of all that is set forth in the specification of the patent in suit, and further and other than "Gabbett agitation in the usual way with 0.1 per

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cent. oleic acid" the long specification discloses no method or suggestion of other agitation, and gave none to the art. Such specification starts with reference to the Cattermole patent, from which we have quoted, Nos. 777,273 and 777,274, and states that in the former:

"Oil varying from 4 per cent. to 6 per cent. of the weight of metalliferous metal present is agitated with an ore pulp so as to form granules which can be separated from the gangue. * * * We have found that if the proportion of oily substance is considerably reduced—say to a fraction of 1 per cent. on the ore—granulation ceases to take place, and after vigorous agitation there is a tendency for a part of the oil-coated metalliferous matter to rise to the surface of the pulp in the form of a froth or scum."

Such was the discovery the patentees embodied in the two claims here in issue, viz.:

Claim 1:

"The herein-described process of concentrating ores which consists in mixing the powdered ore with water, adding a small proportion of an oily liquid having a preferential affinity for metalliferous matter (amounting to a fraction of 1 per cent. on the ore), *agitating the mixture until the oil-coated mineral matter forms into a froth, and separating the froth from the remainder by flotation.*"

And claim 12:

"The process of concentrating powdered ore which consists in separating the minerals from gangue by coating the minerals with oil in water containing a fraction of one per cent. of oil on the ore, *agitating the mixture to cause the oil-coated mineral to form a froth, and separating the froth from the remainder of the mixture.*"

It will be observed that these two claims do not themselves cover any complete, workable process of concentration disclosed in the specification, but are separate steps or elements in the process of workable concentration described in claim 3, which in addition to the above elements includes the elements of acid and heat. And that the extract quoted above, embodied in claims 1 and 12, was not a complete concentration process but merely certain elements or steps of it, is made clear by the patentees, for, after reciting that "there is a tendency for a part of oil-coated metalliferous matter to rise to the surface of the pulp in the form of a froth or scum," they add:

"This tendency is dependent on a number of factors. Thus the water in which the oiling is effected is preferably slightly *acidified* by adding say a fraction of 1 per cent. up to 1 per cent. of sulphuric acid or other mineral acid or acid salt, the effect of this acidity being to prevent gangue from being coated with oily substance, or, in other words, to render the selective action of the oil more marked. * * * Again, we have discovered that the tendency for the *oily substance to disseminate* through the pulp and the rapidity with which the metalliferous matter becomes coated is increased as the pulp is *warmed.*"

It will thus be seen that the workable concentration process which the patentees gave the art, was one in which the "flotation of mineral particles" was dependent on a number of factors, viz.: First, Gabbett agitation; secondly, 0.1 per cent. of oleic acid; thirdly, 0.1 per cent. sulphuric acid; and, fourth, heated pulp. And the workable process embodied all these four elements used in the method of working the invention, which the patentees necessarily showed in compliance with

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the statutory requirements that they "shall file in the Patent Office a written description of the same, and of the manner and process of * * * using it, in such * * * exact terms as to enable any person skilled in the art * * * to use the same," suggests that they regarded all four elements as constituting their workable process, and indeed they attribute to heat the permeating and rapid coating of the minerals with oil.

Complying with the statutory requirement, the patentees say:

"The following is an example of the application of this invention to the concentration of a particular ore. An ore containing ferruginous blende, galena, and gangue consisting of quartz, rhodonite, and garnet is finely powdered and mixed with water containing a fraction of 1 per cent. or up to 1 per cent. of a mineral acid or acid salt, conveniently sulphuric acid or mine or other waters containing ferric sulphate. To this is added a very small proportion of oleic acid (say from 0.02 per cent. to 0.5 per cent. on the weight of ore). The mixture is warmed, say, to 30° to 40° centigrade, and is *briskly agitated* in a cone mixer or the like, *as in the processes previously cited*, for about *two and one-half to ten minutes*, until the oleic acid has been brought into *efficient contact* with all the mineral particles in the pulp. When agitation is stopped, a large proportion of the mineral present rises to the surface in the form of a froth or scum which has derived its power of flotation *mainly from the inclusion of air bubbles introduced into the mass by the agitation, such bubbles or air films adhering only to the mineral particles which are coated with oleic acid.*"

It is urged that this is but a sample method of showing how their process was workable. But the sample element consisted in the particular treatment given to a particular character of ore. It was not a sample of one of many possible kinds of agitation, for the kind of agitation applicable to all kinds of ore was concededly of one sort, namely, as therein stated, "briskly agitated in a *cone mixer or the like,* as in the processes previously cited." And the testimony of those who made the discovery and made the disclosure shows that the way, and the only way, they discovered and disclosed, was a definite kind of agitation, and that this definite kind of agitation made their disclosed process workable. Indeed, that maximum of agitation and minimum of oil, increase of agitation and decrease of oil, were axioms in this process is made clear by the proofs. As the amount of oil was decreased, the amount of agitation had to be increased. In that regard, Sulman, one of the patentees (volume 1, p. 53), says:

"The first requisite of any oil concentration process is to obtain efficient contact between the oil and the mineral and suitable methods must be employed to effect this. Where the oil is in large relative quantity to the mineral, *violent agitation is unnecessary*, and may be very harmful. With decreasing proportions of oil more vigorous agitation or mixing *is necessary to insure such efficient contact of oil with the mineral particles.* The agitation may therefore be said to be roughly proportioned to the work to be done in bringing about contact between large or small quantities of oil in regard to the mineral."

His evidence (page 54) is that in the Gabbett mixer of the cone type he first saw produced the froth of the specification:

"The apparatus that I first saw the agitation froth produced in as described on the specification referred to was the ordinary Gabbett apparatus consisting of a vessel with rotating cone and with suitable baffles. The cone was rotated at a high rate of speed, about 1,000 revolutions per minute."

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The use of the ordinary speed of the Gabbett mixer to effect the intermingling of the oil with the mineral particles, and the use of superadded speed for the purpose of entraining air and producing froth, is made clear by the testimony of Picard, another of the patentees. Thus (page 109) in answer to the question:

"Q. In carrying out the process which the patent in suit purports to disclose, is there anything distinctive about the mode of agitation of the oiled pulp as compared with the agitation used in applying the Cattermole process, wherein the purpose is to granulate and precipitate the valuable mineral?"

—Picard says:

"In actual fact the same apparatus was employed for both purposes during my connection with the experimental work on the two processes. In the patent in suit it is *more essential to beat in air*, which is not an important point, and *rather to be avoided*, in the Cattermole process, where the object *was only* to mix the various ingredients, air not being one of them."

And he adds (page 110):

"We already knew from the first test that the cause was due to reducing the quantity of oil much below that hitherto employed, and observation of the froth clearly indicated that the air which had been beaten in played an important and *essential* part in the production of this new phenomenon. I presume that further investigation work was carried on, but in my opinion the invention may be said to have been completed after that first operation. * * * I had no idea, prior to this, that by reducing the quantity of oil to the limits which were used in this experiment that such a result would be obtained. I, of course, knew that air would float mineral, previously oiled; but it was not anticipated by me hitherto that this particular result would be obtained if *air were beaten in*, in the manner in which it was done in making this test."

John Ballot, the third patentee, also emphasizes (volume 1, p. 118) this "intentional beating in of air" caused by violent agitation, where in answer to the question:

"And when you saw the work in progress from March 1, 1905, onwards, as referred to by you in your answer to question 29, was this the first occasion upon which you had been informed as to the use in an oil flotation process of the *intentional beating in of air* for the purpose of promoting flotation?"

—he says:

"*The intentional beating* in of air to produce or promote the flotation of froth which was developed by that process was certainly not known until the fact had been actually discovered by using a very small quantity of oil, say 0.2 or 0.1 per cent., and agitating it for a certain time, and then leaving the mixture to stand that the whole froth rose to the surface. By 'discovered I mean until the experiments had established the fact that this extraordinary phenomenon was every time reproduced by using the small quantity of oil, *violently agitated*, and then leaving it to stand, when the mineral rose to the surface in the form of dense froth."

He adds:

"We considered it established, and that the principal cause of flotation, or *perhaps the entire cause of flotation*, was *due to air beaten* into the pulp, assisted, of course, by the other agents."

Indeed, the discovery of beating air by agitation into the pulp as the groundwork of the discovery, and therefore of the resultant disclosure, is summed up by the witness Ballantyne (volume 1, p. 225) in the words:

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"After *violent agitation in such a way as to introduce air into the pulp, the agitation lasting several minutes*, the pulp was brought to rest and immediately a coherent and persistent froth rose to the surface. Although I was closely familiar with all the earlier processes of ore concentration in which oil had been used, * * * the production of this agitation froth was to me little short of a miracle."

In this development it will be seen that Mr. Ballantyne makes the violent agitation of the cone mixer the basic step in these words.

But not only was the testimony of these witnesses that this air-beating or air-entraining agitation was the agency which produced a froth of a hitherto unknown type, but we have the authoritative view of the Supreme Court that the *lifting force* of the bubbles is to be found not in the quantity of oil used, but in the maximum of agitation, "greater than and different from that which had been resorted to before." We think the agency of this air-beating-in agitation as the functional cause of air flotation, is made clear by the Supreme Court. In that regard that court says:

"The small amount of oil used makes it clear that the lifting force which separates the metallic particles of the pulp from the other substances of it is not to be found principally in the buoyancy of the oil used, as was the case in prior processes, but that this fact is to be found, chiefly, in the buoyancy of the air bubbles introduced into the mixture by an agitation *greater* than and *different* from that which had been resorted to before and that this *advance* in the prior art and the *resulting* froth concentrates so different from the product of other processes make of it a patentable discovery as new and original as it has proved useful and economical."

In quoting and approving the decision of the House of Lords, 27 R. P. C. 33, the Supreme Court alluded to the dual functional capacity of the patentees' agitation: First, as a mixer of oil with the mineral particles (the function of Gabbett agitation at normal speed); and, secondly, the formation of air cells by air entraining (the function of Gabbett agitation at abnormal speed). The extract thus quoted with approval from the English decision, is:

"They [the patentees of the *Agitation Froth Process* of the patent in suit] are not promoting a method of separation which had been before described, but they are engaged upon a new method of separation. Istead of relying upon the lesser specific quantity of oil in bulk they rely upon the production of a froth by means of an agitation which not only assists the process of *minute quantities* of oil reaching *minute* particles of metal, but *forms a multitude of air cells*, the buoyancy of which air cells, forming around single particles of the metal, floats them to the surface of the liquid."

And that agitation of a particular kind, and not agitation of any kind, was the disclosure of the specification, is shown by Dr. Liebman, who says:

"I believe that 500 or 600 revolutions are quite sufficient for the Cattermole process (metal sinking). But I believe that at least 1,200 revolutions per minute *are necessary* for the process of the patent in suit in the same apparatus."

From the above review, it is clear that the basis of this invention was agitation, and of agitation of a particular type and power, and that such type and kind of agitation gradually led to the further discovery that all oil, except the minimum required for mineral coating, could not be dispensed with. That the invention cannot be based on the

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use of a minimum of oil alone is clear, for the stress laid on agitation in the specification, and its presence as an element in the claim here in issue, forbid any such holding, and the further fact that a claim based wholly on the use of a fraction of 1 per cent. of oil for coating minerals was abandoned during the prosecution of the patent, to wit:

"The process of concentrating powdered ore which consists in separating the minerals from gangue by coating the minerals with oil in water containing a fraction of 1 per cent. of oil on the ore, and recovering the oil-coated minerals."

Seeing, then, that no change occurs in the character of the oil itself, in the amount required to coat the metal particles, or the affinity of the particles when coated, it follows that the essence of this patent lies in the agitation by which this low percentage of oil is made available. Now, what was the nature of this agitation? It had a number of characteristics:

First, it was produced by machinery of high power operating on mechanism revolving at high speed. This mechanism was a special type; i. e., a *top-inlet* or *cone* Gabbett mixer which embodied certain features, each of which was necessary to the successful working of the invention disclosed: (a) The application of the mixer to the pulp was confined to such restricted zone of the pulp as was inside the cone; (b) to this cone-restricted zone the air had access; (c) the speed of the agitation was raised to a hitherto unused point; (d) the air in the chamber was by the speed of the agitator beaten into the pulp segregated in the cone; (e) in addition to high speed, time was required, the agitator being revolved from 2½ to 10 minutes before the entrance of air appeared in froth; (f) the agitator was of such novel, individual, and inventive character as to warrant the grant of a patent; (g) the agitator was of such special type and speed that the froth it produced was also of a new type, or, as the Supreme Court said, "utterly different from any froth known before."

But, because the claims here in controversy use the word "agitation," without description or limitation, it is argued that the term should be used in a broad, generic sense, and cover any and every agitation which results in the air flotation of mineral coated particles. Put into practical commercial application, this means a monopoly of the principle of air flotation of oil-coated minerals, with the one exception, namely, where 0.1 per cent. or more of oil is used. To our mind, this use of the literalism and verbiage of this one word "agitation" to foreclose this whole great controversy loses sight not only of the spirit of the patent law, but also of the principles on which this contract—for a contract with the government is what this claim is—should itself be interpreted, for in construing that contract we must construe it as a whole; that is, the claims plus the specification, and not the claims minus the specification. We must also consider the claims in the light of the evolution of experiment that led up to the discovery, and consequently to the disclosure.

It is argued here that no sort of agitation is specified in the specification, that the phrase or idea of beating in air is not even mentioned in the specification, that there is no mention of any specific form of agi-

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tation, and that therefore there is no qualification or limitation to be given to the type or kind of agitation. But this loses sight of the fact that the patent is based on the Cattermole process, and that that process and the patentees used a Gabbett mixer, and when the word "agitation" was used in the specification it referred to what the patentees had used in making their discovery, and was well understood by persons versed in the art, and when they spoke of the production of froth by agitation they meant precisely what they reported in their experiments, to wit:

"The froth produced is not due to any action of the acid circuit upon traces of calcite present in the ore; i. e., not to the liberation of any gas in the charge by means of the dilute acid employed in the circuit. It has been located, on the contrary, to the *air introduced by the Gabbett cone during agitation, the air attaching itself to the oiled mineral slimes and to a large proportion of the coarse mineral particles, although both these materials can only be coated with an infinitesimal amount of oil; i. e., oleic acid.* That the formation of froth is due to *air inclusions* during the agitation, and not to carbonic acid or sulphuretted hydrogen, is proved by the following experiences."

It is quite evident not only that this was the precise word and the disclosed sort of "agitation" they had in their minds when they disclosed their discovery. Moreover, we think that courts and judges have held this was the meaning of "agitation." In passing upon the validity of the patent, the Supreme Court explained what the patentee's invention was, and defined the agitation of that discovery as "beating the air into the mass." This beating of air into the mass by the Gabbett mixer being the sense in which that word was used in the specification, and no disclosure or suggestion of any other agitation being made, the burden is certainly on the patentees to show that, when the word "agitation" was used in the claim, it meant anything else than the agitation disclosed in the specification, to wit, that of the Gabbett mixer or its substantial equivalent. For the word "until," in "agitating the mixture *until*," aptly described the "two and a half to ten minutes" of the directions of the specification during which a Gabbett mixer was to be operated before the froth was produced. In so holding, we do not minimize, belittle, or underrate the very important discovery these inventors made. But the great discovery they disclosed was based on two facts—oil of a certain kind, and agitation of a certain kind. The quantity of oil was less than a tenth. The agitation was by beating in the air until a froth came. That was the extent of their discovery, their disclosure, and their claim. Within those limits they are entitled to protection. Beyond that the art has a right to progress and improve.

So regarding the claim, we turn to the defendants' plants, as to first of which, namely, the one in operation when the bill was filed, there can be no question. It is simply a replica of the plaintiff's process, used as a Gabbett mixer, as did Hyde in the case in the Supreme Court, and, so far as it is concerned, infringement, and an accounting should be decreed. But as to the defendants' second plant I cannot agree that the claims in question cover it. I shall not enter into a detailed description of its working, but at present restrict myself to saying that the basic feature of the defendants' process is the sub-aeration of the pulp through the agency of compressed air. There is no air expansion as an agitating agency in plaintiff's process. They beat

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no air into the pulp; they introduce compressed air into the pulp, and avail themselves of the instant expansion of that air to form a different kind of bubble from that of the patentees, and they get a different kind of froth. And the crux of the case may, as we view it, be stated in this way: If the defendants were applying for a patent for concentrating ore, which consisted in sub-aerating a mixture of ore and a fraction of 1 per cent. of oil through the agency of compressed air, would such process be anticipated by the plaintiffs? The test of that question is, not whether the product of two processes is the same, but whether the steps of the two processes are substantially the same. Addressing ourselves to that question, I have reached the conclusion that the defendants' process approaches the problem in a wholly different line from the patentees, and, while the result is the same, that result is reached by steps or means acting in a different way and by a different method. Physically the defendants' method substantially and functionally consists in the liberation of air under light pressure, seven pounds' compression, into the pulp mixture. Physically, by the turn of a stopcock this light pressure is turned on, and instantly aeration and bubble forming begins, and agitation follows. The physical difference between the two systems is as striking in its way as it would be if a person, standing on the stern of an ocean steamer and seeing the maelstrom caused by the 100 a minute revolutions of a screw, should be told that these revolutions, the screws themselves, the shaft, and the ship's great engines, could be taken out of the ship, and their places supplied by a tank of air under mild compression. And yet that is just what these defendants have done. They have eliminated, not 100, but 1,000, revolutions a minute of the Gabbett mixer; they have eliminated the shaft, couplings, and power machinery which was necessary to actuate this; and for it they have substituted the stopcock of a tank filled with air under light compression. Defendants have eliminated such a distinctive element of plaintiff's process that it was patented. The physical difference between the means employed is well illustrated in this way: Suppose the owner of the Gabbett agitator were to sue the defendants for infringement by the use of a compressed air apparatus; could an expert be found so rash as to even suggest that the two were substantially equivalent? Not only are the two not mechanical equivalents, but it is evident that in the two processes the Gabbett mixer and the compression tank work on wholly different principles. The Gabbett mixer uses agitation to beat the air in, in order to thereafter produce bubbles; and that only after several minutes' work produces bubbles, and these bubbles only rise after the several minutes' agitation goes on. In other words, in plaintiff's process bubbles are the product of agitation. In the defendants' practice the expansion of the air itself, on its release from compression, at once creates bubbles, and the instant rise of these bubbles to the surface at once sets up agitation. In other words, the defendants' bubble causes agitation, while in the patentees' agitation causes bubbles. In the one there is a gentle agitation of the fluid, caused wholly by the expansion of air when released from compression. In the other there is no expansion of the air; it is simply beaten into the mixture by the action of the arms of the Gabbett mixer. In the plaintiffs' process the agitation forms the air cells,

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and only after several minutes' physical exertion; in the defendants' the air, on its release from compression, by its own inherent power, forms the cell, and forms it instantly.

It has been suggested that in defendants' process the air is shot into the mixture like a bullet from a gun, and that there is no difference between shooting air into a mixture with a gun and beating it in with a paddle. But it is manifest that the defendants' practice is not the shooting in of a violent air blast, but is in allowing air under slight compression to escape from such slight compression at the bottom of the tank. To have the compressed air strike the top surface of the pulp would not lead to any bubble introduction, and consequently to no subsequent agitation by rising bubbles, for such bubbles as would be formed would already be near the surface. It will thus be seen that the introduction of compressed air is necessarily made at the bottom of the pulp vessel, and it is also apparent that no such *sub-air* introduction, which characterizes the defendants' process, could be effected by the Gabbett beating in of the air, for in such case the moving blades of the mixer would have to be wholly immersed in water, and, as we have seen heretofore, such immersion forbade the use of the top-outlet form of Gabbett agitation shown in Figure 1. These differences in form and principle, the difference between a hurricane and a zephyr, the spread between the maelstrom action of a swift-moving mechanism and the bubbling, seeping action of air released from compression at the foot of a tank, and then in the case of the Callow cell oozing or seeping its way between the threads of a canvas, are so different in degree of violence and mode of action that one would naturally expect some difference should evidence itself in their product.

And such is the case. In the defendants' process the bubbles rise at once to the surface; but they are so frail that they absolutely require the continuous support of other bubbles. For in case the air is shut off below, and the upward bubble stream stops, those on the surface at once disintegrate. The defendants' bubbles are ephemeral; they are matured at birth; and, like all such creations, lack self-sustaining power. On the other hand, the plaintiffs' bubbles evidence themselves at the surface in a froth which is only formed after from 2,500 to 11,000 revolutions of the mixer (2½ to 10 minutes of 1,000 to 1,100 revolutions), but when so gradually formed are so self-sustaining that they last for days and are so tough that they support a shovel. If the production of such froth by such a protracted and violent agitation was a contribution of inventive and novel worth to ore concentration, and apart from all authoritative decision that is our estimate of the goal it reached, then for another to reach that same goal without making the tough, persistent, shovel-carrying froth, and without using the thousands of revolutions of powerful machinery, absolutely required to produce it, is also a contribution of inventive and equal worth to ore concentration. And the best evidence of its worth, of its simplicity, and of its effectiveness is the fact that the plaintiffs themselves use it and concede its superiority. Concededly valuable as sub-aeration is, it is certain the ore-concentration art never would have had it, if we were dependent on the plaintiff's patent to give it to the art. Not only did the patent in suit not disclose it, but, if anything, their disclosure

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pointed away from rather than to the probability of the use of compressed air. Thus in their specification they take pains to avoid the imputation even of using gas as a flotation agency, and ex majore cautella give notice that "it is to be understood that the object of using acid in the pulp according to this invention is not to bring about the generation of gas for the purpose of flotation thereby"—a statement the Supreme Court referred to as evidencing that their work tended not in the line of introduction of gas, but "to the presence of the air introduced into the mixture by the *agitation* which had been resorted to, to mix the oil with the particles of crushed ore."

Indeed, that the use of compressed air with their concentration process was not in the patentees' concept is strikingly shown by the fact that, had they had any such use in view of the power of compressed air to do the work of the Gabbett mixer, their suggestion of the possibility of its use was almost challenged by the use to which they suggested it could be put to in the second and third spitzkasten, where no mixing or separation was required. They there say:

"An alternative method for the recovery of any sunk oiled metalliferous matter which may be deposited in the second and third spitzkasten is as follows: The products suspended in circuit liquor are removed from the spitzkasten and placed in a vessel in which they are submitted to an *additional pressure of air or other gas* of from, say, one to two atmospheres or over. On relief of such pressure the bubbles of air or other gas *so generated* throughout the mass at once sweep to the surface thereof all the metalliferous matter in the form of a froth which can be separated as before. This idea is not claimed broadly in this case, but forms the subject-matter of an application filed by us on January 9, 1906, serial No. 295,326."

Of course, whatever ideas they had on the subject were embodied in another application, and offered no basis for a claim in this patent; but even this suggested use of compressed air as a flotation agent to these experienced men suggested to them no use of that agency in the process of this patent. It remained for some other engineer, in this case the defendants' experimenter, to discover and disclose it. This view is emphasized by the fact that five years after this patent was applied for, and two years after it became the owner of it by assignment, the plaintiff joined with one Hoover in applying for a British patent for such use of compressed air. In that patent the patentees themselves emphasize the points we have made, saying:

"This method of introducing the gas may have three functions: (I) The *gas* may *bring about* the necessary agitation of the mass. (II) The gas, being in a state of very fine division, is effectively brought into contact with every mineral particle, thus *clearly differentiating the process* from that of the patent where the mechanical stirrers caused the agitation and *thus preceded bubbles*, while here *bubbles preceded and caused agitation*."

In the patent in suit the mechanical action of the stirrers, kept up for ten minutes, brought about air being brought into contact with the mineral particles, while by the subgaseous process, the gas being in a state of fine division through seeping through the canvas, is, as said above, "brought into contact with every mineral particle." The fact that the present plaintiffs, five years after the grant of the patent, joined Hoover in taking out this patent, in itself shows that it then regarded the sub-air process as one not covered by the patent in suit, and

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may well cause a court to hesitate to give a construction to the patent in suit which is at variance with the plaintiffs' conduct in taking out this Hoover patent.

To me it seems clear that the field of discovery the patentees disclosed was not the broad principle of air flotation, for concededly that principle was known before. What they did disclose was an original method of using the broad principle of air flotation in a particular way. That method was by beating air into pulp with a minimum of oil. They showed how the beating in of air could be effected, and they showed a novel froth product as a result of this beating-in process. In their process air was the product of agitation, and not the agitating agent. In their process bubbles did not appear until protracted agitation was ended. Not only was it produced by agitation, but it did not appear until agitation ceased. It will thus be seen that air was in no way an agitation agency in the plaintiffs' process, in its specification, or in its claims; but the agitation disclosed therein was wholly the physical agitation of an extraneous mechanical process. Now, this occupancy of the field of air flotation, novel, useful, and inventive, the plaintiff disclosed and should be awarded. But, by occupying this part of the field, the process of entraining air by mechanical beating in, the plaintiff did not foreclose all further advance in air flotation. Air flotation as a recognized principle was known before this patent, and by discovering one way to utilize that principle the patentees did not bar all other ways of making use of that principle. If they had discovered the broad principle of the capacity of oil to coat minerals and to reject gangue, if they had first discovered the coating of air bubbles with oil, if they had first shown that oil-coated minerals and oil-coated bubbles would unite and rise to the surface, we could regard them as first comers into a newly discovered field, and as entitled to make all further progress in that art servient to those who created it. And while this has been done in some notable instances, it is nevertheless true that even great and notable steps in a great art can be disclosed by patentees without blocking all further progress in that field. In that regard we are admonished by the later rulings of the Supreme Court in patent causes, which began with Westinghouse v. Boyden, that even such a great invention as the instantaneous stoppage of every car on a great freight train, an invention which is at the bottom of the movage of tonnage to-day, did not bar other inventors from showing other means of using air to accomplish the same result. And such holdings as Westinghouse v. Boyden and the like seem to us the true principle which should govern the administration of the patent law, namely, giving full protection to the full limit of the disclosure made, and refusing to extend that limit so as to bar further advance by others. Applying that principle to the present case, I would hold that the step of the process "agitating the mixture until the oil-coated mineral matter forms into a froth" meant the novel air-entraining agitation which the patentees disclosed and did not cover the novel air-releasing agitation which the defendants disclosed.

In accordance with these views, and in support thereof, I am constrained to record my respectful dissent to the opinion of the court.

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(244 Fed. 793)

FRANK F. SMITH METAL WINDOW HARDWARE CO. v. YATES.

(Circuit Court of Appeals, Second Circuit. June 6, 1917.)

No. 267.

1. PATENTS ⟹326(2)—SUIT FOR INFRINGEMENT—VIOLATION OF INJUNCTION.
A defendant cannot avoid the consequences of violating an injunction against infringement by doing so through the agency of a corporation organized by him.

2. PATENTS ⟹326(1)—INFRINGEMENT—VIOLATION OF INJUNCTION—PROCEEDINGS FOR PUNISHMENT.
While the question of infringement by a machine, which has been modified after a decree and injunction against the original machine, will not be tried on a motion to punish for contempt, if the change is substantial, it may be so dealt with where the change is clearly only colorable.

Appeal from the District Court of the United States for the Southern District of New York.

Suit in equity by the Frank F. Smith Metal Window Hardware Company against John W. Yates. From an order and decree adjudging defendant in contempt for violating a decree granting an injunction against manufacture and sale of sash pivots for windows, defendant appeals. He also seeks to review the District Judge's action in denying a rehearing of the motion to punish for contempt. Affirmed.

See, also, 216 Fed. 361; 216 Fed. 359, 132 C. C. A. 503.

The following is the opinion of District Judge Augustus N. Hand in the court below:

A decree was granted by this court, adjudging complainant's patent, No. 970,656, granted to Frank F. Smith for a transom adjusting device, valid and infringed. Frank F. Smith Metal Window Hardware Company v. Yates, 216 Fed. 361. This decree was affirmed by the Circuit Court of Appeals in a decision reported in 216 Fed. 359, 132 C. C. A. 503. The cause was then referred to William Parkin, as master, whose report awarding treble damages to the complainant was confirmed. A decree for $2,464.98, including damages and costs, was thereafter made against Yates. The latter transferred his business to a corporation known as John W. Yates, Incorporated. This transfer was adjudged by this court in fraud of Yates' creditors, and a retransfer to the trustee in bankruptcy of Yates, who had filed a voluntary petition in bankruptcy, was ordered. The foregoing sum of $2,464.98 was then paid, and the decree setting aside the transfer vacated. Yates is now resuming his old course of persistent infringement and seeks to defend himself on the grounds that (1) complainant's patent is invalidated because of the Bogenberger prior use; (2) that the transom adjusting device in question does not infringe the patent in suit; (3) that if the patent is infringed, the infringing device is not manufactured or sold by the defendant, but by the John W. Yates, Inc., a corporation.

The complainant sought to reopen the case after final hearing because of the Bogenberger prior use. It is claimed that Bogenberger had a device similar in all respects to complainant's and that his invention was as early as April, 1907, whereas the date of complainant's invention is said to have been July of that year. Affidavits were submitted to Judge Learned Hand for the purpose of securing the admission of testimony as to this use, and he refused to reopen the case by reason of anything which was brought to his notice relating to the Bogenberger invention. I can see no relevancy in discussing the Bogenberger device at this time. The validity of the patent in suit has been established and the very affidavits relied upon are nothing more than copies of those heretofore unsuccessfully in-

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troduced by the defendant before Judge Learned Hand. Furthermore, the copies of the affidavits offered fail to meet the burden devolving upon one seeking to establish a prior use by that convincing proof which the law requires. Something more than the mere statement of a man that he was the prior inventor of an article in all respects like the complainant's is necessary to supply that proof beyond a reasonable doubt which has been held to be necessary to render a patent right granted by the government invalid.

The stop which the John W. Yates, Incorporated, is putting out, defendant insists is not an infringement of the patent. His argument is based on the contention that in complainant's device there is an offset between the stop and the pivot of the latch, which brings them so far out of alignment that the pivot is subjected to a leverage which is likely to break or weaken it. The defendant insists that his new latch is so arranged that the body of the sash plate, instead of the pivot, takes the impact of the latch against the limit stop, thereby relieving the pivot from the shock and strain of the impact. In the present device manufactured by John W. Yates, Incorporated, the latch is upon the sash frame and the stop upon the window frame, just as in complainant's device, so that the infringement seems even clearer than that adjudicated by this court upon the trial, for there the latch was upon the window frame and the stop upon the sash. A careful inspection of the new infringing device would seem to indicate that the strain upon the pivot is not lessened, or the pivot reinforced to any degree which a practical use of the device requires, if at all. Even if I am wrong, these changes on the part of Yates are but slight improvements in the structure. This latch and stop attain the same result as complainant's in the same way, and the utmost he could claim would be certain narrow improvements which he is seeking to patent. These particular features, if patented, complainant might not have a right to use, but their presence in the new Yates' device would not avoid infringement of complainant's structure.

I am of the opinion that Yates is again attempting to deprive the complainant of the results of his invention, and that the reinforcement of the pivot, and the lessening, if any, of the leverage against it, furnish no basis for an escape from the charge of infringement. The defendant is undoubtedly guilty of infringement. He appears to be in charge, at least of the manufacturing end, of the business of the corporation, to which he transferred his assets. This transfer has already been held by this court to have been nothing more than a cover to avoid his creditors. He cannot escape his legal obligations by violating an injunction through the agency of a corporation, or even as an active employé in its business.

The infringing device comes so clearly within the claims of the adjudicated patent, and so closely resembles the old transom adjusting device, which was heretofore held to infringe, that I do not deem it necessary to take testimony as to the matters arising upon this motion, as was done in the case of Sundh Electric Co. v. General Electric Co. (D. C.) 217 Fed. 583. In the case of Bonsak Machine Co. v. National Cigarette Co. (C. C.) 64 Fed. 858, Judge Lacombe held that a question of infringement should not be tried on a motion to punish for contempt when the new machine is made under a patent issued after an injunction is granted. The defendant claims to manufacture under the Bogenberger patents, which antedate the injunction.

In the case of Crown Cork & Seal Co. v. American Cork Specialty Company, 211 Fed. 650, 128 C. C. A. 154, the Circuit Court of Appeals said that it was the practice in this circuit—"not to deal with modifications of a machine held to be an infringement, on motions to punish for contempt, unless the change was plainly a mere colorable equivalent; if the change was substantial fairly arguable as to its being covered by the patent, it has been the practice to leave the patentee to an application to enjoin its use." While it is possible that the defendant may have believed that the new device escaped infringement of the patent nevertheless the distinctions were so slight that I regard the new transom adjusting device as a mere colorable equivalent of the old, and for that reason hold that the defendant should be adjudged guilty of contempt of the injunction heretofore issued, and that the motion to restrain the manufacture and sale of the new infringing device should be granted. I shall not, however, hold the defendant as for a criminal contempt.

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but shall limit the order to be made against him, as was done in the case of Proudfit Loose Leaf Co. v. Kalamazoo Loose Leaf Binder Co., 230 Fed. at pages 132–134, 134 C. C. A. 418, to a reimbursement of complainant's damages, costs, and expenses, including any damages on account of sales of the infringing device.

Settle order on notice.

Samuel E. Darby, of New York City, for appellant.

Stephen J. Cox, of New York City, for appellee.

Before COXE, WARD, and HOUGH, Circuit Judges.

COXE, Circuit Judge. [1] The record shows a persistent and disingenuous purpose on the part of the defendant to appropriate the invention of the complainant. It also shows an emphatic recognition of the value of the invention by the courts of this circuit.

The patent in controversy is No. 970,656, granted to Frank F. Smith September 20, 1910, for an improved pivot and pivoting mechanism for use in connection with fireproof windows whose sashes and frames are made of sheet metal. The District Court for the Southern District held this patent valid and infringed in an action against the defendant. This court affirmed the decree and a master has stated the damages to be $2,464.98. The defendant Yates, after the decree against him, transferred his business to a corporation known as the John W. Yates, Incorporated. This transfer was adjudged by the District Court to be in fraud of Yates' creditors and a retransfer to Yates' trustee in bankruptcy was ordered. The District Judge refers to Yates as a persistent infringer. His defenses to this action are that the patent is invalid because of a prior use by Bogenberger, that the new device does not infringe and, if it does, the device is made not by John W. Yates, but "John W. Yates, Incorporated," a corporation.

The court held that no new defense is presented in the present controversy. It is argued that the new stop which the so-called corporation is putting out is not an infringement because of some inconsequential changes. All this is thoroughly treated in Judge Augustus Hand's opinion and need not be reconsidered. The addition of the word "Incorporated" to the defendant's name does not enable him to escape the charge of infringement. The transfer to the corporation was adjudged a fraud upon creditors and the defendant was properly ordered to transfer all the property to the trustee in bankruptcy. The denial of the motion to reopen the case to receive evidence of the so-called Bogenberger prior use was within the discretion of the court. The device in controversy is the mechanical equivalent of the device which this court held to be an infringement of the Smith patent. We are unable to find any proof in the record showing that Yates owned or was licensed under the Bogenberger patent. Mere assertion is not proof. We are not required upon an appeal from an order of this character to discuss hypothetical questions not warranted by the proof. We do not find any proof that the defendant was licensed under the Bogenberger patent or that he now owns that patent. We have, however, examined the model of Bogenberger's apparatus submitted to

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us, together with his patent, and after such examination consider it clear that Yates has neither made nor imitated Bogenberger's device, but has put out in the face of an injunction something which, within the narrowest range of mechanical equivalency, is the plaintiff's patented mechanism.

[2] It is admitted that where after decree and injunction a defendant's machine is reorganized by more than merely colorable changes, it is the better practice, if infringement thereby is asserted, not to proceed as for contempt, but to require plaintiff to bring a new action or seek a supplemental injunction. Crown Cork, etc., Co. v. American Cork, etc., Co., 211 Fed. 650, 128 C. C. A. 154. No such point arises here. Yates' present apparatus is scarcely a colorable change from that which was enjoined; a finding which requires that the order under review be affirmed with costs.

(244 Fed. 796)

O. K. TOOL HOLDER CO. v. J. H. WILLIAMS & CO.

(Circuit Court of Appeals, Second Circuit. April 17, 1917.)

No. 210.

PATENTS ⟹328—INFRINGEMENT—TOOL HOLDER.

The Grant patent, No. 802,206, for a tool holder, covers only minor improvements, and, as limited by the prior art, *held* not infringed.

Appeal from the District Court of the United States for the Eastern District of New York.

Suit in equity by the O. K. Tool Holder Company against J. H. Williams & Co. Decree for defendants, and complainant appeals. Affirmed.

On appeal from a final decree dismissing the bill which alleged the infringement by the defendant of letters patent No. 802,206, granted October 17, 1905, to Charles W. Grant, assigned to the complainant. The complainant appeals from that part of the decree which dismisses the bill for noninfringement. The defendant has not appealed from that part of the decree declaring the patent to be valid.

Clifton V. Edwards, of New York City, for appellant.

Fraser, Turk & Myers, of New York City (Arthur C. Fraser, Henry M. Turk, and Eugene V. Myers, all of New York City, of counsel), for appellee.

Before COXE, WARD, and ROGERS, Circuit Judges.

COXE, Circuit Judge. The Grant patent in suit, No. 802,206, relates to a type of tool holder illustrated in a prior patent to Grant, No. 677,350, dated July 2, 1901. The object of the later patent is to simplify and cheapen the construction and improve the operation of the holder of the prior patent.

The complainant commenced business in 1901, and for about four years manufactured under the prior Grant patent of July, 1901. The business was not successful because of the inadequacy of the holder.

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This situation led to the production of the holder of the patent in suit. Prior to 1912 the defendant purchased about 75 tool holders from the complainant, made under the patent in suit and in 1912 it brought out the alleged infringing device, which is the subject of this controversy. The patent has two claims and both are involved. They are as follows:

"1. A tool holder comprising a body having its forward end provided with a hole to receive the shank of a tool, said body having a recess *15* and a recess *18* at right angles thereto, a locking plunger in recess *15*, the relative construction of the plunger and recess being such as to permit only longitudinal movements of the plunger, a plunger in recess *18* having an incline adapted to engage the rear end of the plunger, and means for moving the plunger into engagement with the locking plunger whereby the latter is forced into engagement with the tool to lock the tool to the holder.

"2. The combination with a tool holder having a body provided with a recess *15*, and with a recess *18* at right angles thereto, an abutment to form a support for a tool, and having a hole at right angles to recess *15*, of a tool having an enlarged portion adapted to rest upon the abutment and having a shank to engage the hole, a locking plunger in recess *15*, said recess *15* being above the abutment, a plunger in recess *18* and having an incline adapted to engage the rear end of the locking plunger, and means for actuating the plunger in the direction of its length whereby the locking plunger is caused to lock the tool."

The only question is whether the defendant's holder infringes these claims. The record shows that the field of invention was largely occupied when Grant entered it with his application of November 29, 1904, which covers a slight improvement only over the prior art. The object to be obtained was not a difficult one in view of the progress which had previously been made in this and analogous arts. It was simply to provide a suitable holder for a machine tool. The prior art shows numerous constructions where the tool is clamped in situations similar to that shown in the Grant patent in suit.

Smith's British Patent of 1867, Bracke's Swedish Patent of 1902, Cooper's patent of 1866, all show devices for holding the tool in position by means quite similar, in the method of operation and in the result obtained, to those described and shown in the Grant patent in suit. So, too, the so called headed-tool holders were known prior to the date of the Grant invention. The "Old Williams tool" of 1901 as shown in the blue print, Exhibit N, was completed prior to October, 1902. Muehlberg, in 1900, produced a tool for use in a lathe for boring or reaming having two cutters; when operated in a lathe only one of these cutters could be used at a time.

Without pursuing the subject further, it seems obvious that with the tools alluded to, and others which appear in the prior art, there was no room for a broad generic invention when Grant entered the field. The defendant's tool holder which is alleged to infringe both of the claims of the Grant patent in suit is made under a patent to Amborn dated October 26, 1915. It will be seen by an examination of the claims of the Grant patent that the first claim contains the following:

"The relative construction of the plunger and recess being such as to permit only longitudinal movements of the plunger, a plunger in recess *18* having an incline adapted to engage the rear end of the plunger, and means for moving the plunger into engagement with the locking plunger."

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The defendants do not have any means for preventing the locking plunger from having other than longitudinal movement in the recess *15*. The next element which defendant omits is the plunger in recess *18*. The cam which it substitutes has a rotary movement only. The defendant does not have the means shown in the patent for "moving the holder into engagement with the locking plunger."

The second claim is not infringed because two of its elements are not found in the defendant's structure, viz., "the plunger in recess *18*," which is the same plunger referred to in almost identical language in the first claim. The defendant insists that it does not have the "means for actuating the plunger in the direction of its length" which is one of the elements of the claim. The defendant substitutes a cam for a plunger and does not use the nut *21*. The brief for the defendants states the situation, as we understand it, as follows:

"Grant in this patent limited himself voluntarily and necessarily to one of two well recognized types of locking devices very well known for tool holders, viz.: (1) A wedging plunger lock; (2) a rotary eccentric cam lock. Grant recognized that his invention related to the first of these two types and limited his claims thereto. Defendant's structure relates to the second of these two types and is wholly outside of the Grant patent."

Concededly the field of invention in this class of tool holders was an exceedingly limited one. Improvements had been going on for nearly half a century, by a steady evolution. When Grant applied for his patent in 1904 there was no chance for a broad generic patent. Headed tools and bar tools were well known and although they were simple in construction and easily understood there was room, perhaps, for patented improvements. Of course no improver was entitled to a patent which dominated the entire art.

In Bragg v. Fitch, 121 U. S. 478, 7 Sup. Ct. 978, 30 L. Ed. 1008, the Supreme Court said:

"It is obvious from the foregoing review of prior patents, that the invention of Bristol, if his snap hook contains a patentable invention, is but one in a series of improvements all having the same general object and purpose; and that in construing the claims of his patent they must be restricted to the precise form and arrangement of parts described in his specification, and to the purpose indicated therein."

In New Home Sewing Machine Co. v. Singer Mfg. Co. (C. C.) 68 Fed. 224, the court said:

"The patentee is not entitled to the liberal treatment accorded to a pioneer. He has made a small advance in the art and has informed the public of the precise nature of his improvement. He must abide by the language of the claim as he has chosen to write it."

The defendant's tool is made under the patent to Amborn No. 1,158,100 which raises a presumption, at least, that its elements are not mechanical equivalents for the elements of the claims of the Grant patent. We are of the opinion that the Grant patent cannot be construed as covering a generic invention but only minor improvements and that the defendant's tool holder does not infringe.

The decree is affirmed with costs.

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(244 Fed. 897)

HART et al. v. ADAIR et al.

W. C. HARDING LAND CO. v. HART et al.

(Circuit Court of Appeals, Ninth Circuit. August 20, 1917.)

No. 2686.

1. PRINCIPAL AND AGENT ⟹8—CREATION OF AGENCY—CONSTRUCTION OF CONTRACT.

The owners of a tract of land made a contract with a land company by which the latter agreed to subdivide, improve, and sell the land at its own expense, at not less than a fixed minimum price per acre, for which it was to receive a share of the proceeds. Sales were to be made by the company in its own name, and the owners were not to be responsible for its contracts to make improvements, nor were they to receive any benefit from the enhanced price obtained by reason of such contracts. *Held*, that such contract did not make the company the agent of the owners for the sale of the land, nor render them liable for fraudulent misrepresentations made by the company to purchasers.

2. CANCELLATION OF INSTRUMENTS ⟹43—SUIT FOR RESCISSION—DEFENSES—PLEADING.

In a suit for rescission of a contract for fraud, ratification, if relied on as a defense, must be pleaded.

3. APPEAL AND ERROR ⟹173(1)—REVIEW—ERRORS NOT ASSIGNED.

Under rule 11 of the Circuit Court of Appeals (208 Fed. vii, 124 C. C. A. vii), that court is not required to consider a defense which was not pleaded, nor brought to the attention of the trial court, nor made the subject of any assignment of error, and it will not do so unless the error is plain and a failure to notice it will result in a miscarriage of justice.

4. CANCELLATION OF INSTRUMENTS ⟹17—RIGHT OF ACTION—RATIFICATION.

Ratification, to bar a suit for rescission of a contract for fraud, must have been after the party had knowledge of the facts which entitled him to rescind.

5. CANCELLATION OF INSTRUMENTS ⟹17—RIGHT OF ACTION—RATIFICATION.

The mere assignment by the purchaser of a contract for the sale and purchase of land is not a ratification of the contract which precludes a suit for rescission for fraud in its inception, but vests such right of action in the assignee.

6. COURTS ⟹372(1)—FEDERAL COURTS—AUTHORITY OF STATE DECISIONS.

A federal court is not bound by a decision of the highest court of a state upon a question of general law, which was not rendered until after the commencement of the suit in which it is invoked.

Appeal from the District Court of the United States for the District of Oregon; Robert S. Bean, Judge.

Suit in equity by Mrs. Glenn D. Hart and Glenn D. Hart against the W. C. Harding Land Company, Walter Adair, J. T. Epperly, James P. Burns, F. S. Green, and L. B. Wallace. Decree for complainants against the corporation defendant, from which it appeals, and for the individual defendants, from which complainants appeal. Affirmed.

Glenn D. Hart and his wife brought a suit against the Harding Land Company, a corporation, and the individual defendants, Adair and others, for the rescission of three contracts for the sale and conveyance of three 10-acre tracts within a larger tract of land, and for the recovery of the installments of purchase money paid under the contracts. The individual defendants had

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purchased the larger tract, consisting of 461 acres, had made a cash payment thereon, and had given a mortgage to secure deferred payments. They entered into a contract with the Harding Land Company for the subdivision and sale of the land. The contract provided that the minimum price per acre to be charged to purchasers should be $200; that the first "$13,061 of sale contracts" should be placed in escrow for the original owners of the land; that the next "$10,000 of contracts" should become the property of the individual defendants; and that the balance realized should be equally divided between those defendants and the Land Company. The Land Company was to bear all expenses of the sales, and to receive a commission of 17½ per cent., to be deducted from the first cash received. The Harding Company proposed to plant orchards on the land, and the individual defendants stipulated that they should not be held responsible in any way for the Land Company's contracts for planting and care of trees, and they were to receive no benefit from the added price to be put on the land through such planting and care. The tracts were to be sold under the name of the Land Company, but the deeds were to be given by the individual defendants.

The tract was subdivided by the Land Company, and in the year 1910 lots Nos. 19 and 18 were sold to Hart and his wife respectively. Lot 17 was sold to Ella Peterson. These sales were made under an agreement on the part of the Land Company to plant the land with certain kinds of trees, and to cultivate the same for a period of 3 years. The plaintiffs alleged that they and Ella Peterson were induced to purchase the lands by certain fraudulent representations on the part of the Land Company, the representations being set forth in detail, and they alleged that Ella Peterson had transferred to the plaintiff Mrs. Hart all of her rights under her contract of purchase. The court below found that the evidence sustained the allegations of the complaint as to the fraudulent representations, and entered a decree of rescission on behalf of the plaintiffs, and adjudged that they recover from the Land Company the money advanced by them on account of their contracts of purchase; that the contract of Ella Peterson be rescinded, and that the money paid by her be recovered by Mrs. Hart; but adjudged that the individual defendants did not participate in the fraud, and are not answerable for the moneys so paid to the Land Company. From that portion of the decree discharging the individual defendants from liability, the plaintiffs have appealed. From the portion decreeing the rescission of the contracts and the return of the purchase money to the plaintiffs, the Land Company has appealed. Both appeals are presented in one record.

E. A. Lundburg, of Portland, Or., for appellants Hart.

O. P. Coshow, of Roseburg, Or., for appellant W. C. Harding Land Co.

B. L. Eddy, of Roseburg, Or., for appellees Adair and others.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] We find no error in that portion of the decree which discharges the individual defendants from liability for the moneys due the plaintiffs from the Land Company. It is contended that they are liable on the ground that the Land Company was their agent. We think that the Land Company was not the agent of the owners in dealing with purchasers of the land. The owners were not parties to any contract which the Land Company made with the purchasers. They stipulated that every contract made by the Land Company for sale of any of the land should be made in its own name. The Land Company was to survey, plat, and plant the land, and sell it at its own expense. The owners were not to be responsible for any of the expense of planting

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or cultivating fruit trees. This is not a case of a broker negotiating sales as the agent of the owner. The Land Company was acting and selling in its own name. It had a contract which enabled it to deal with the property as its own. It is true that restrictions were placed on its power to sell, but this was only for the protection of the owners. It had no power to bind the owners by any representations of the quality of the land, or by promises of future improvement thereof. "An agent with restricted power to sell a tract of land at a given price has no power to bind his principal by any representations as to the quantity or quality of the land." National Iron Armor Co. v. Bruner, 19 N. J. Eq. 331; Samson v. Beale, 27 Wash. 557, 68 Pac. 180; Mayo v. Wahlgreen, 9 Colo. App. 506, 50 Pac. 40; Tucker v. Gibson, 80 Kan. 90, 101 Pac. 633; Kern v. Feller, 70 Or. 140, 140 Pac. 735.

Nor can we sustain the Land Company's contention that the evidence does not support the finding of the court below that the plaintiffs and their assignor were induced to enter into the contracts of purchase by means of false and fraudulent representations. The Land Company made these contracts with the plaintiffs and their assignor by agents in Dakota and Colorado. The agents represented to them that the land was worth $350 an acre; that it was choice orchard land; that it had been examined by an expert orchardist; that the soil was a sandy loam, and easily cultivated; that it was well drained and needed no irrigation; and they exhibited to them literature containing glowing representations of the profits to be realized on raising fruit on the lands, and assured them that is was unnecessary for them to come to Oregon to see the land; that they could rely upon the statements of the agents and the representations of the company, and that the expense of a trip to Oregon would be useless. There was evidence that the plaintiffs and their assignor, relying on these statements, entered into the contracts and made payments thereon. There is abundance of evidence that these representations were false and fraudulent, and, although the evidence is conflicting, the case is clearly one for the application of the rule that the finding of the court of first instance, who saw and heard the witnesses, will not be disturbed on appeal.

The Land Company contends that the plaintiffs should have been denied relief in equity for the reason that they and their assignor ratified the contracts of purchase; citing Grymes v. Sanders, 93 U. S. 55, 23 L. Ed. 798, in which it was held that, where a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose and adhere to it, and that, if he be silent and continues to treat the property as his own, he will be held to have waived the objection.

[2] To this it is to be said, first, that in order to avail itself of the defense of ratification it was necessary for the Land Company to plead it. 9 C. J. 1246, § 181; Northern Pac. R. Co. v. Kindred (C. C.) 14 Fed. 77. In its answer it pleaded no such defense, and even if it should be held that the evidence, which was admitted without objection tending to show ratification, might be sufficient to have authorized the court below to pass upon that question, it still does not appear that

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the question was ever brought to the court's attention. Nor is it now suggested by any of the Land Company's assignments of error.

[3] The purpose of our rule 11 (208 Fed. vii, 124 C. C. A. vii) is to permit us to notice palpable error not assigned, where the failure to consider it would result in injustice. Central Improvement Co. v. Cambria Steel Co., 201 Fed. 811, 120 C. C. A. 121; New York Life Ins. Co. v. Rankin, 162 Fed. 103, 89 C. C. A. 103; United States v. Bernays, 158 Fed. 792, 86 C. C. A. 52; Baltimore & O. R. Co. v. McCune, 174 Fed. 991, 98 C. C. A. 561; and P. P. Mast & Co. v. Superior Drill Co., 154 Fed. 45, 83 C. C. A. 157, a case in which the court said: The object of the rule "is to prevent the miscarriage of justice from oversight." It will hardly be contended that the alleged error is plain, or that our failure to take notice of it will result in a miscarriage of justice.

But, notwithstanding the absence of an assignment, we have examined the record, and we find it insufficient to show ratification. It is the Land Company's contention that in July, 1912, two years after they entered into the contracts, Hart and his wife acquired knowledge of the condition of the land, and that thereafter Hart's conduct was such as to show that he recognized the validity of the contract, he being his wife's agent. But the proof does not show that in 1912 either Hart or his wife acquired definite knowledge of the fraud that had been practiced upon them. In July of that year, in company with the secretary of the Land Company, they saw the land for the first time. Their testimony is that when they arrived at the land the secretary began to apologize for its condition, saying that the company had been hard up, and could not get help to take care of the land, and could not plow it, "and made all kinds of excuses"; that they found a few trees scattered over the tract; that weeds were higher than the trees; and that the secretary said: "Let's forget this; I will take you over to Garden Valley and show you some good land;" that when they went to the Land Company's office, Harding, the president, said: "I want to apologize to you people for the condition that land is in. I am going to try to sell that land for you people and locate you over in Garden Valley." Now, it appears that subsequent to that date, on November 6, 1912, Hart wrote to the secretary, stating that he was thinking seriously of caring for his wife's tract the coming year, and that on March 20, 1913, he wrote to Harding, asking after the growth of the trees, and the condition of the land and Mrs. Hart's lot, and saying:

"I am still figuring that I can sell some of your tracts this coming summer. I am for you all the time. I hope that you will prosper and that your company will be the biggest in the world in a few years."

The facts which the plaintiffs discovered when they visited the land in 1912 should not be taken as going to show more than that the Land Company had not kept its promises to plant trees on the land, and properly till and care for the same. In May, 1913, Mrs. Hart came again to Oregon and met Ella Peterson, and, in consequence of what she heard from her, Mrs. Hart placed the matter in her attorney's hands, and they caused an investigation of the facts to be made. That

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investigation resulted in evidence that the land was wholly unfit for orchard purposes, owing to its poor drainage and the nature of the soil, and that its value was far less than it had been represented to be. Hart testified that he first learned of the falsity of the statements made by the Harding Land Company after Mrs. Hart's attorneys had caused an investigation to be made in May, 1913. He said: "Down to then I believed this land was as represented."

[4] The burden of proof to establish ratification was upon the Land Company. Pence v. Langdon, 99 U. S. 578, 25 L. Ed. 420. Ratification waives rescission only—

"where a party, with knowledge of facts entitling him to rescission of a contract or conveyance, afterward, without fraud or duress, ratifies the same." 9 C. J. 1198, § 77.

In Pence v. Langdon, 99 U. S. 578, 25 L. Ed. 420, the court said:

"Acquiescence and waiver are always questions of fact. There can be neither without knowledge. The terms import this foundation for such action. One cannot waive or acquiesce in a wrong while ignorant that it has been committed. Current suspicion and rumor are not enough. There must be knowledge of facts which will enable the party to take effectual action. Nothing short of this will do."

In Ward v. Sherman, 192 U. S. 168, 175, 24 Sup. Ct. 227, 230 (48 L. Ed. 391), the court cited with approval the following from Pollock's Principles of Contracts:

"The contract must be rescinded within a reasonable time, that is, before the lapse of a time after the true state of things is known, so long that, under the circumstances of the particular case, the other party may fairly infer that the right of rescission is waived."

In 9 C. J. 1200, § 80, it is said:

"Equivocal acts which do not clearly evince a purpose, with complete knowledge of the fraud, to retain the property as his own, will not defeat the right of the person defrauded to rescind."

This rule was applied in Watts v. British, etc., Mortage Co., 60 Fed. 483, 9 C. C. A. 98; Tarkington v. Purvis, 128 Ind. 182, 25 N. E. 879, 9 L. R. A. 607; Allen v. Railroad, 106 N. C. 515, 11 S. E. 576, 826; McLean v. Clark, 47 Ga. 24; and Whitcomb v. Sager, 82 Wash. 572, 144 Pac. 922.

[5] Nor can we assent to the proposition that Mrs. Peterson ratified her contract by the mere act of assigning it to Mrs. Hart.

[6] The Land Company cites and relies upon Cooper v. Hillsboro Garden Tracts, 78 Or. 74, 152 Pac. 488. That decision is not binding upon this court. It does not construe or apply any state statute. Nor does it create a rule of property. And, even if it did, it would not be controlling authority here; for it was not rendered until a year after the court below decided the case which is now before us, and not until long after the rights of the plaintiffs had accrued under the assignment. A federal court is not bound by the decision of the highest court of the state in such a case. Burgess v. Seligman, 107 U. S. 20, 2 Sup. Ct 10, 27 L. Ed. 359; Carroll County v. Smith, 111 U. S. 556, 562, 4 Sup. Ct. 539, 28 L. Ed. 517; Julian v. Central Trust Co., 193

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U. S. 93, 103, 24 Sup. Ct. 399, 48 L. Ed. 629; Great Southern Hotel Co. v. Jones, 193 U. S. 532, 24 Sup. Ct. 576, 48 L. Ed. 778; Jones v. Great Southern Fireproof Hotel Co., 86 Fed. 370, 30 C. C. A. 108; City of Mankato v. Barber Asphalt Paving Co., 142 Fed. 329, 73 C. C. A. 439. Prior to the decision in Cooper v. Hillsboro Garden Tracts, it had been the law in Oregon, as held by the Supreme Court of the state, that such a contract as the one here under consideration was assignable. The general rule is expressed in 5 C. J. 891, as follows:

"In the absence of such statutory regulations, a right of action for fraud or deceit is generally held * * * assignable where the injury is regarded as affecting the estate, or as arising out of contract. The mere fact that the right to enforce a claim which is itself assignable depends upon showing fraud incidentally, does not make such right of action nonassignable."

To that text one of the authorities cited is Sperry v. Stennick, 64 Or. 96, 129 Pac. 130, a case in which it was held that a right of action for money received, arising from defendants' false representations with reference to the purchase of certain land, by reason of which plaintiff's assignor was induced to pay the defendants money for an interest in real property, was a cause of action that would survive and was therefore assignable. The decision in Cooper v. Hillsboro Garden Tracts should be confined in its effect to the question actually decided, which was that a mere naked right to sue for a fraud cannot be transferred alone and by itself. In that case the court relied upon what had been said in Scott v. Walton, 32 Or. 460, 52 Pac. 180, a case in which the opinion was written by Judge Bean, who decided the case which is now before us. That decision went no further than to hold that there is waiver of the right to rescind for fraud, if the defrauded party remains in possession of the land received by him in exchange, and endeavors to dispose of it, and exercises full and complete ownership over it. That was held in view of the facts in the case which indicated that the plaintiff, after discovering the fraud, had collected the proceeds of a lease on the property, and had tried to sell the land. The present case is not such a case. Mrs. Peterson did not exercise rights of ownership over the land or attempt to sell it, nor did she sell it to Mrs. Hart. What she did was to assign to Mrs. Hart all her rights under her contract.

We find no error. The decree is affirmed.

(244 Fed. 902)

BAUER et al. v. MYERS et al.

(Circuit Court of Appeals, Eighth Circuit. April 5, 1917.)

No. 4532.

1. WILLS ⟹166(4)—VALIDITY—CONSTRUCTION OF STATUTE—"PRINCIPAL BENEFICIARY."

Gen. St. Kan. 1909, § 9787, provides that "in all actions to contest a will, if it shall appear that such will was written or prepared by the sole or principal beneficiary in such will, who, at the time of writing or preparing the same, was the confidential agent or legal adviser of the

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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testator, or who occupied at the time any other position of confidence or trust to such testator, such will shall not be held to be valid unless it shall be affirmatively shown that the testator had read or knew the contents of such will, and had independent advice with reference thereto." *Held*, that one who, by the will of a testatrix, was made trustee of a large part of her estate, to invest and reinvest the same and pay over the income for certain stated purposes, but whose only pecuniary interest was under a provision that he should "be paid reasonable compensation for his services," was not the "principal beneficiary" in the will, within the meaning of the statute, and that such statute had no application to him.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Principal Beneficiary.]

2. PERPETUITIES ⟹8(1)—EXCEPTION TO RULE AGAINST TRUSTS FOR PUBLIC CHARITABLE USES.

At the common law and in the federal courts, the rule against perpetuities has no application to a bequest for charitable uses, and a bequest of a sum of money in trust, the net income to be paid over annually to the mayor of a city, to be by him "expended in the assistance and support of the poor of said city," creates a trust for a public charitable purpose, and is valid, although the trust is in perpetuity; and such trust is not invalidated by the fact that the principal sum does not go to charity, or because the state cannot directly appropriate money for the support of the poor.

Appeal from the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

Suit in equity by Caroline Bauer and others against John Q. Myers and others. Decree for defendants, and complainants appeal. Affirmed.

J. G. Hutchison, of Kansas City, Mo. (J. E. Boruff and Ray R. Boruff, both of Bedford, Ind., and Wm. T. Jamison and Howard L. Jamison, both of Kansas City, Mo., on the brief), for appellants.

James A. Troutman, of Topeka, Kan., for appellee Board of Foreign Missions of Methodist Episcopal Church.

F. T. Woodburn and Charles Hayden, both of Holton, Kan. (E. D. Woodburn, of Holton, Kan., on the brief), for other appellees.

Before HOOK and SMITH, Circuit Judges, and REED, District Judge.

PER CURIAM. This was brought as an action in equity in the United States District Court of Kansas to set aside the will and the probate thereof of Mrs. Louise Sitzler, who died on Monday, April 15, 1912. The will was executed Saturday, April 13, 1912. It is alleged in the bill of complaint that the will was offered for probate and probated in common form in the probate court of Jackson county, Kan., in April, 1912. The bill in this case was filed January 31, 1914, and all the defendants were served with chancery subpœnas, either personally or by publication, or not found, within the two-year statute of limitations. The District Court rendered a decree in favor of the defendants, and the plaintiffs appeal.

The evidence shows that the deceased was born in the town of Martinshohe, Pfalz, Bavaria, now in the Empire of Germany, in Feb-

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ruary, 1834. She attended school in Germany from her sixth to her thirteenth year. She came to the United States about 1853, at about 19 years of age and has lived in the United States until her death, or about 59 years. She moved to Pennsylvania and there married John Sitzler, and moved with her husband to Kansas about 1858, when she was about 24 years old, and continued to live there until her death, a period of 54 years. She conversed in German or English, and read Bibles in both languages. Her English speech was characterized as broken. She had during most of her life no lucrative calling, except as she was an aid to her husband. It appears that John Sitzler in his lifetime had converted substantially his whole estate, except his homestead and household furniture, into money and turned it over to Mr. John Q. Myers, as president of the State Bank of Holton, who is the same person named as defendant in this action, with an agreement that it should be loaned upon security approved by Sitzler; that Myers, as president, would account for 4 per cent. interest upon it. At the time of his death he had been acquainted with Myers about a quarter of a century, and twice a year Myers called upon Sitzler at his home to settle up this interest charge. John Sitzler died January 23, 1912, leaving a will in favor of his wife, Louise Sitzler, of all his worldly goods. His estate was inventoried at $48,393.34. After his death his widow, Louise Sitzler, renounced her right to be appointed administratrix, there being no executor named in the will, and the defendant Myers was appointed administrator c. t. a. He was in possession of the estate as such administrator when Louise Sitzler died. Of course he never took possession of the home or household furniture of the parties. John Sitzler was in the habit of advising with John Q. Myers about all his investments of the sum turned over by Sitzler to Myers. The deceased took her bed Thursday evening, April 11, 1912, and died of pneumonia the following Monday. Katie Grauer had lived with this old couple for about 11 years before their deaths. She testified:

"She [testatrix] and her husband and I composed the family. She did what business was done. She generally done the counting. When he came home from town, she generally counted things up."

This old couple left no children surviving them, and Mrs. Ray testifies concerning deceased:

"I call her a bright business woman. * * * She could read English. She could read out of the Bible to me; read it in English; read it in German. * * * Of course, she read our home papers, and have heard her read the dailies. I heard her talk about the disposition of her property she intended to make. * * *"

The same witness testified:

"Mrs. Sitzler didn't say the amount; she said she and her husband had agreed to treat the relatives equally; to divide equally between his people and her people, whatever they gave hers; to give the same to her relatives and to his."

Lelia Lindley called on deceased at 3 or 4 o'clock on Saturday before her death. She had known the deceased ever since the witness

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was a child. She had been a school-teacher for 36 years at the time she testified. She said the deceased was an intelligent woman, and she was just as bright at this last interview as she ever was.

Mrs. Sigmund testified:

"I heard the discussion of the lawyers to draw the will. Mr. Price's name was mentioned first; wanted to send for the lawyers, and Mr. Price's name was mentioned first, and then another man's, but I don't remember; and then some one suggested Mr. Crane, and they decided on Mr. Crane; and then Mr. Myers' name was mentioned, but I couldn't say whether it was Mrs. Nauheim or who mentioned the names. In this conversation about the lawyers and Mr. Myers, they were all three kind of talking, Mrs. Sitzler, Mrs. Nauheim, and Dr. Seavers."

When the deceased was about and well, she promised Mr. Morton Maiers and wife some potatoes for seed, saying that she had more than she needed now that Mr. Sitzler was dead. Between 3 and 4 o'clock on Saturday, the 11th of April, 1912, on the day she made her will, at about 4 or 5 o'clock, they called to see her. Katie Grauer asked Mrs. Maiers if they had bought any seed potatoes, and Mrs. Maiers having answered they had bought some, the deceased spoke up and said to give her some. After the discussion testified to by Mrs. Sigmund, some one telephoned to Mr. Myers, and he took Mr. Crane down to the house, and Mr. Crane made full notes of what Mrs. Sitzler wanted to do with her property, went back to his office, and left the notes of the proposed will with Mr. Woodburn and went to the courthouse to try a case. Upon his return Mr. Woodburn had the will drawn, and they then compared the will with the notes, then Mr. Crane went to the bank, saw Mr. Myers, and they got in the buggy and drove back down to the house of Mrs. Sitzler. Mr. Crane testified he then read every word of the will to Mrs. Sitzler.

The first item of the will was a direction for the payment of all her just debts, including funeral expenses. The second and third items of the will gave to Katharine Grauer, being the one heretofore referred to as Katie Grauer, the homestead of the parties and the household goods and furniture. The fourth to the fourteenth items of the will gave to the relatives of herself and of her husband $500 each. The fifteenth item gave a like sum to Lawrence Whitcroft, who was the child of a foster daughter of the deceased. The sixteenth item, as originally prepared, read as follows:

"I do give and bequeath to John Q. Myers the sum of ten thousand dollars ($10,000.00) in trust, nevertheless, to and for the following uses and purposes, that is to say: The said trustee, and his successors in trust, shall invest and reinvest the said sum of ten thousand dollars ($10,000.00) in such securities as will bring the largest income, consistent with perfect security, giving preference to first real estate mortgages and shall pay the net income thereof to Katharine Grauer for her support and maintenance during her natural life and at and forever after death the net income thereof shall be paid annually on December 1st of each year to the Board of Foreign Missions of the Methodist Episcopal Church."

When this was read to the deceased she said that:

"She had been thinking about that matter during the day, and that she didn't want that money held in perpetual trust after the death of Katie Grauer, but that she wanted it paid at her death to the church absolutely."

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Mr. Crane testified:

"She asked me if I could change that will without too much trouble. I said, 'Yes, I can interline it.' And I asked for a pen and ink, and a pen and ink was brought, and I wrote. * * * That is my handwriting; I made that change at her request. She said she thought it over and concluded she wanted it that way, and she said the will was all right, just as she wanted it, and then we got Mrs. Nauheim, who is now dead, and Mrs. Morrow, she said they were satisfactory to her as witnesses, and we asked them if they would sign as witnesses, and they did, and it was signed there in the presence of everybody."

This item, as thus amended, read when signed:

"Item XVI. I do give and bequeath to John Q. Myers the sum of ten thousand dollars ($10,000.00) in trust, nevertheless, to and for the following uses and purposes, that is to say:

"The said trustee, and his successors in trust, shall invest and reinvest the said sum of ten thousand dollars ($10,000.00), in such securities as will bring the largest income, consistent with perfect security, giving preference to first real estate mortgages and shall pay the net income thereof to Katharine Grauer for her support and maintenance during her natural life, and at her death to be paid to the Board of Foreign Missions of the Methodist Episcopal Church to promote its purposes."

Items 17 and 18 of the will are as follows:

"Item XVII. I do further give and bequeath to the said John Q. Myers the further sum of three thousand dollars ($3,000.00) in trust for the following uses and purposes, to wit: The said trustee and his successors in trust shall invest and reinvest said sum in good securities such as will yield the largest income, consistent with perfect safety, giving preference to first real estate mortgages and shall annually pay the net income thereof to the mayor or other chief municipal officer of the city of Martinshohe, Pfalz, Bavaria, to be by him expended in the assistance and support of the poor.

"Item XVIII. I do further give, devise and bequeath to the said John Q. Myers, all of the rest and residue of my estate remaining after the payment of the preceding bequests in this will made, in trust, however, for the following uses and purposes, to wit:

"The said trustee and his successors in trust shall invest and reinvest the said remainder of my estate in good securities, such as will bring the best income consistent with perfect security, giving preference to first real estate mortgages and shall annually pay the net proceeds thereof to the mayor of the city of Holton, Jackson county, Kansas, to be by him expended for the assistance and support of the poor of said city."

Item 19, the last, appoints John Q. Myers executor of the will.

The bill sought the relief asked upon numerous grounds: First, want of testamentary capacity. The evidence that the deceased at the time of the making of the will was of sound and disposing mind and memory is overwhelming, and without saying there was absolutely no evidence of lack of testamentary capacity we are compelled to say that the finding of such capacity is not only abundantly sustained by the evidence, but it is gravely doubtful whether any other finding on that subject would be sustained by an appellate court.

Second, undue influence; third, fraud; fourth, that because of her extremely weakened physical condition, limited education and experience, imperfect knowledge of the English language, she could not and did not understand its contents. All of these contentions were overruled by the trial court on the evidence, and rightly so.

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It was quite natural for the deceased to send for the defendant, John Q. Myers, who was the long-time friend of her late husband and his trusted agent in the handling of all the estate she was about to devise and bequeath. There is no evidence that he even offered suggestions as to the will, much less that he urged anything with reference to it. It is true that one of the counsel for the defendant in the opening statement said:

"On Saturday preceding her death, she was ill, quite ill, and expressed a desire to execute a will, and requested that Mr. John Q. Myers, who was the administrator with will annexed of her husband's estate, should be sent for. Mr. Myers, upon receiving this word by telephone, called up his attorney, Mr. A. E. Crane, who is, of course, well known to your honor, and these two gentlemen went down together to the residence of Mrs. Sitzler," etc.

We realize that in Oscanyan v. Arms Co., 103 U. S. 261, 26 L. Ed. 539, it was held that the court could direct a verdict for the defendant upon the opening statement of counsel for the plaintiff, if it showed his client was not entitled to a verdict, and we shall assume that the same rule applies to a defendant's opening statement, and that, if it showed the defendant was not entitled to a verdict, a motion for a directed verdict for the plaintiff should be sustained. We are aware that this case has been cited and followed by the Supreme Court some eight times, but in the original opinion the court said:

"Of course, in all such proceedings nothing should be taken, without full consideration, against the party making the statement or admission. He should be allowed to explain and qualify it, so far as the truth will permit; but if, with such explanation and qualification, it should clearly appear that there could be no recovery, the court should not hesitate to so declare, and give such direction as will dispose of the action."

The evidence of the witness Sigmund clearly showed that before the deceased saw the defendant Myers at all on the subject Mr. Crane was selected to draw this will, and it was therefore not in his capacity as attorney for Myers, but in his capacity as attorney for Mrs. Sitzler, that he attended and drew the will, and the fact that Mr. Myers was utilized to call him does not change the fact. The statement that "Mr. Myers, upon receiving this word by telephone, called up his attorney, Mr. A. E. Crane," does not say he called him up in his capacity as his attorney; but aside from this there is no evidence of any undue influence upon the part of Mr. Crane in the matter of the drawing of the will, save that it is claimed that the creation of Myers as trustee under the sixteenth, seventeenth, and eighteenth items was suggested by him. This will be considered later.

The deceased made this will in accordance with her previous agreement with her husband, and displayed great intelligence in its drafting, which she absolutely dictated, with the possible exception hereafter noted. There was no fraud practiced upon her, and the court was absolutely right in rejecting the second, third, and fourth objections made.

[1] The Kansas General Statutes of 1909 contained the following:

"Sec. 9787. That in all actions to contest a will, if it shall appear that such will was written or prepared by the sole or principal beneficiary in such will, who, at the time of writing or preparing the same, was the confidential agent

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or legal adviser of the testator, or who occupied at the time any other position of confidence or trust to such testator, such will shall not be held to be valid unless it shall be affirmatively shown that the testator had read or knew the contents of such will, and had independent advice with reference thereto."

It is upon this statute that the fifth objection is based:

"That it [her will] was prepared by, or under the direction of, the principal beneficiary, and procured by him to be signed and declared by Louise Sitzler to be her last will and testament, without her having independent advice, as required by section 9787, General Statutes of Kansas of 1909."

The appellants say this raises the following questions: First, was the will written or prepared by the defendant Myers, within the meaning of this statute? Second, is he the principal beneficiary in the will, within the meaning of this statute? Third, was he the confidential agent of, or did he sustain any other relation of confidence or trust to, the testatrix? Fourth, did she have any independent advice concerning said will?

These questions can all be readily answered. The will was not written, prepared, or dictated by the defendant Myers. It was written and prepared solely by Mr. A. E. Crane, who was the individual attorney of the testatrix, and engaged solely in that capacity, although he may have also been the regular attorney of Mr. Myers. Mr. Myers is not the principal beneficiary in the will, as that term is used in the statute. While he is made trustee of much of the property, it is not at all for his benefit; but he would be held strictly to account for the whole thereof by the court having the matter in charge. We can well accept the definition contended for of "beneficiary." A beneficiary is defined as one who receives a benefit or advantage, according to Webster's International Dictionary, or one who is in the receipt of benefits, profits, or advantage, according to the Century Dictionary. It is said by appellants:

"The word has no fixed or technical meaning, and may mean one thing in one place and another in another."

Myers was not the principal beneficiary, and there is nothing in Kelty v. Burgess, 84 Kan. 678, 115 Pac. 583, to indicate otherwise.

It is claimed that the provision that Mr. Myers "be paid reasonable compensation for his services," makes him the principal beneficiary. Of course, as trustee he would be entitled to reasonable compensation from the court administering the trust, in the absence of any such provision in the will, so the provision gave him absolutely nothing; but there is another reason the amount allowed him was to be just compensation for services rendered, and he was to receive nothing except as he earned it. So while he might owe a debt of gratitude to the testatrix for appointing him to this office in preference to another, and thus giving him an opportunity to earn this money, he would owe this money to his time and labor expended, and not to the bequest under the will. The method by which the appellants compute the probable amount he will get per annum, and then estimate the receipts during his lifetime from this sum, is ingenious, but not persuasive.

The third and fourth questions propounded under this statute might both be assumed to be answered in the affirmative, without admitting

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that such assumption is necessary, and still the statute has nothing to do with the case. The property covered by this will was all primarily the earnings of John Sitzler, and he had arranged his widow should have it all, and divide such as was left, and she wished to so divide equally between each individual relative of his and hers. This she did, and gave a part to one who, when all her own relatives had remained away from her in her extreme age, had stayed and cared for her for 12 years. Her relatives now seek to deprive his relatives and this good woman, who cared for her, of any portion of this estate, and absorb it all on specious complaints of undue influence, fraud, etc. Mrs. Sitzler had earned no part of this money, except as a good helpmeet. This court is not predisposed to reverse the court below merely because it refused to rob the heirs of John Sitzler, who earned the money, and the woman who had cared for John Sitzler and his old wife, to give it to the heirs of Louise Sitzler.

[2] The only serious questions which arise on this appeal are with reference to items 16, 17, and 18 of the will. Aside from other questions, they are all assailed as in violation of the law against perpetuities. The Supreme Court of Kansas, in Keeler v. Lauer, 73 Kan. 389, 393, 85 Pac. 541, 543, speaking of the law against perpetuities, said: "Having no statute on the subject, the common-law rule prevails." It is therefore best to see what the common-law rule is, as determined by the federal courts, unhampered by state court decisions under statutes modifying the common law, and if the result should be found to be not settled by the United States courts we may then turn to the decisions of the state courts.

In Potter v. Couch, 141 U. S. 296, 314, 11 Sup. Ct. 1005, 1010 (35 L. Ed. 721), it is said that the rule against perpetuities was one which "prohibits the tying up of property beyond a life or lives in being and 21 years afterwards." In Inglis v. Sailors' Snug Harbor, 3 Pet. 99, 144 (7 L. Ed. 617) Mr. Justice Johnson said:

> "It is altogether an act of judicial legislation, operating as a proviso to the statute of wills; a restriction upon the testamentary power. The authority from which the exception emanated could certainly limit it, so as to prevent its extension to an object under the care of the sovereign power."

It was apparently in recognition of what was thus said by Mr. Justice Johnson that the Supreme Court in Fitchie v. Brown, 211 U. S. 321, 334, 29 Sup. Ct. 106, 110 (53 L. Ed. 202) said:

> "It is not necessary to find in the will, in so many words, the selection of lives, but that such selection is good if from a consideration of the whole will that selection can be ascertained."

In Ould v. Washington Hospital, 95 U. S. 303, 313 (24 L. Ed. 450) it is said:

> "Charitable uses are favorites with courts of equity. The construction of all instruments where they are concerned is liberal in their behalf. Mills v. Farmer, 19 Ves. 487; McGill v. Brown, supra [Brightly, N. P. (Pa.) 346, note]; Perry on Trusts, § 709. Even the stern rule against perpetuities is relaxed for their benefit."

In Russell v. Allen, 107 U. S. 163, 166, 2 Sup. Ct. 327, 330 (27 L. Ed. 397), it is said:

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"By the law of England from before the Statute of 43 Eliz. c. 4, and by the law of this country at the present day (except in those states in which it has been restricted by statute or judicial decision, as in Virginia, Maryland, and more recently in New York), trusts for public charitable purposes are upheld under circumstances under which private trusts would fail. Being for objects of permanent interest and benefit to the public, they may be perpetual in their duration, and are not within the rule against perpetuities; and the instruments creating them should be so construed as to give them effect, if possible, and to carry out the general intention of the donor, when clearly manifested, even if the particular form or manner pointed out by him cannot be followed. They may, and indeed must, be for the benefit of an indefinite number of persons; for, if all the beneficiaries are personally designated, the trust lacks the essential element of indefiniteness, which is one characteristic of a legal charity. If the founder describes the general nature of the charitable trust, he may leave the details of its administration to be settled by trustees under the superintendence of a court of chancery; and an omission to name trustees, or the death or declination of the trustees named, will not defeat the trust, but the court will appoint new trustees in their stead."

For the reasons indicated in this opinion the opinions in New York, Maryland, and the District of Columbia, which is governed by the laws of Maryland at the date of its cession to the United States subject to subsequent modifications, will not need to be considered by us in this opinion.

In Jones v. Habersham, 107 U. S. 174, 185, 2 Sup. Ct. 336, 346 (27 L. Ed. 401), it is said in reference to a bequest to a charity and upon its termination to another charity that:

"If those conditions are valid, the devise over to the Savannah Female Orphan Asylum, an undoubted charity, will take effect; for as the estate is no more perpetual in two successive charities than in one charity, and as the rule against perpetuities does not apply to charities, it follows that if a gift is made to one charity in the first instance, and then over to another charity upon the happening of a contingency which may or may not take place within the limit of that rule, the limitation over to the second charity is good."

In Hopkins v. Grimshaw, 165 U. S. 342, 352, 17 Sup. Ct. 401, 405 (41 L. Ed. 739), it is said:

"The first inquiry which naturally arises is whether the deed was for a charitable use, in the legal sense. If it was, the conveyance would not be open to any legal objection by reason of the length of time during which the trust might last, or because of the society named not being a corporation. Ould v. Washington Hospital, 95 U. S. 303 [24 L. Ed. 450]; Russell v. Allen, 107 U. S. 163, 171 [2 Sup. Ct. 327, 27 L. Ed. 397]. And the trustees, although the deed did not in terms run to their heirs and assigns, would take the legal estate in fee. Russell v. Allen, above cited; Potter v. Couch, 141 U. S. 296, 309 [11 Sup. Ct. 1005, 35 L. Ed. 721]; Easterbrooks v. Tillinghast, 5 Gray [Mass.] 17, 21."

To the same effect are Duggan v. Slocum, 34 C C. A. 676, 92 Fed. 806; Brigham v. Peter Bent Brigham Hospital et al., 67 C. C. A. 393, 134 Fed. 513; White v. Keller, 15 C. C. A. 683, 68 Fed. 796. See Handley v. Palmer, 43 C. C. A. 100, 103 Fed. 39.

In Wood v. Paine (C. C.) 66 Fed. 807, it is declared that a charitable trust will not be held void because of uncertainty of beneficiaries or incapacity of the trustees to take, as a court of chancery will not permit a charitable trust to fail for want of a trustee or because its particular purposes are uncertain.

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It thus seems clear that, however the law may be elsewhere in the federal courts, the rule against perpetuities has no application to a bequest for charitable uses. All gifts for the promotion of education are charitable ones. Russell v. Allen, 107 U. S. 163, 172, 2 Sup. Ct. 327, 27 L. Ed. 397. And the term "charitable uses" embraces a wide scope, including religious uses.

In Ould v. Washington Hospital, 95 U. S. 303, heretofore cited, on page 310 (24 L. Ed. 450), it is said that the Statute of 43 Elizabeth, c. 4, names 21 distinct charities: "They are * * * (10) of churches" and refers apparently with approval to the opinion of Mr. Justice Baldwin in McGill v. Brown, Brightly, N. P. (Pa.) 346, note, in which he found that there were 46 specifications of pious and charitable uses recognized as within the protection of the law in which were embraced all that were enumerated in the Statute of Elizabeth. In Perry on Trusts it is said that charitable trusts include all gifts in trust for religious and educational purposes, and in 1 Beach on Trusts, § 322, it is said:

"In distinction from an express private trust, which, by the definition, is designed for the benefit of one or more individuals, the trust for charitable purposes is a public trust, and from the nature of the case the beneficiaries are, to a greater or less extent, unknown or indefinite. Ordinarily the trust is designed for the benefit of a class, the individuals of which can be designated only in general terms. In a private trust, if the beneficiary or beneficiaries are not definitely and positively named, the trust fails on the ground of indefiniteness. But in a charitable trust the beneficiaries need not be definitely named, and even where there is no adequate designation of a cestui que trust, the trust will be enforced in equity if the intention of the settlor can be ascertained beyond a reasonable doubt. Trusts for charitable purposes are regarded by courts of equity with special favor, and a much more liberal construction will be put upon an instrument creating such a trust than upon one creating a trust for individuals. A will creating a trust for a charitable purpose will receive, where there is occasion for it, a construction differing very widely from that which would be applied to a trust for an individual."

In Jackson v. Phillips, 14 Allen (Mass.) 539, 550, Mr. Justice Gray said:

"By the law of this commonwealth, as by the law of England, gifts to charitable uses are highly favored, and will be most liberally construed in order to accomplish the intent and purpose of the donor; and trusts which cannot be upheld in ordinary cases, for various reasons, will be established and carried into effect when created to support a gift to a charitable use. The most important distinction between charities and other trusts is in the time of duration allowed and the degree of definiteness required. The law does not allow property to be made inalienable, by means of a private trust, beyond the period prescribed by the rule against perpetuities, being a life or lives in being and 21 years afterward; and if the persons to be benefited are uncertain and cannot be ascertained within that period, the gift will be adjudged void, and a resulting trust declared for the heirs at law or distributees. But a public or charitable trust may be perpetual in its duration, and may leave the mode of application and the selection of particular objects to the discretion of the trustees."

In Pomeroy's Equity Jurisprudence, § 1018, it is said:

"In express private trusts there is not only a certain trustee who holds the legal estate, but there is a certain specified cestui que trust clearly identified or made capable of identification by the terms of the instrument creating

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the trust. It is an essential feature of public or charitable trusts that the beneficiaries are uncertain—a class of persons described in some general language, often fluctuating, changing in their individual members, and partaking of a quasi public character. The most patent examples are 'the poor' of a certain district in a trust of a benevolent nature, or 'the children' of a certain town, in a trust for educational purposes. In such a case it is evident that all the beneficiaries can never unite to enforce the trust; for even if all those in existence at any given time could unite, they could not include nor bind their successors. It is a settled doctrine in England and in many of the American states that personal property and real property, except when prohibited by statutes, may be conveyed or bequeathed in trust, upon charitable uses and purposes, for the benefit of such uncertain classes or portions of the public, and that if the purposes are charitable, within the meaning given to that term, a court of equity will enforce the trust. Furthermore, it is one of the most important and distinctive features of charitable trusts that, however long the period may be during which they are to last, even though it be absolutely unlimited in its duration, they are not subject to nor controlled by the established doctrines, nor even the statutes which prohibit perpetuities. Indeed, it may be said that the full conception of a charitable trust includes the notion that it is or may be perpetual."

It has been repeatedly held that trusts for the benefit of sectarian churches are charities. Note II, 6 L. R. A. (N. S.) 321. In 5 Ruling Case Law, page 291, a charity is defined:

"It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature. Another definition, capable of being easily understood and applied, is that given by Lord Camden as follows: 'A gift to a general public use, which extends to the poor as well as the rich.' The theory of this is that the immediate persons benefited may be of a particular class, and yet if the use is public in the sense that it promotes the general welfare in some way, it has the essentials of a charity. Again, charity has been declared to be active goodness; the doing good to our fellow men, fostering those institutions that are established to relieve pain, to prevent suffering, and to do good to mankind in general, or to any class or portion of mankind."

And on page 293:

"The essential elements of a public charity are that it is not confined to privileged individuals, but is open to the indefinite public. * * * Notwithstanding these general rules, it is usually held that a charity is none the less public because it is limited in its operation to the members of a particular sect or society, so long as it is wholly altruistic in the end to be attained and no private or selfish interest is fostered under the guise thereof."

And again on page 295:

"The requisites of a valid private trust, and of one for a charitable use, are materially different. In the former there must not only be a certain trustee who holds the legal title, but a certain specified cestui que trust, clearly identified, or made capable of identification, by the terms of the instrument creating the trust; while it is an essential feature of the latter that the beneficiaries are uncertain, a class of persons described in some general language, often fluctuating, changing in their individual members and partaking of a quasi public character. The most important distinction, however, between charities and other trusts is that in the time of duration allowed and the degree of definiteness required. Trusts for public charitable purposes, being for objects of permanent interests and benefit to the public, and perhaps being perpetual in their duration, are upheld under circumstances under which private trusts would fail."

We have said enough to indicate that in our judgment these three items all created trusts for support of public charities and wholly di-

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vested any right which the plaintiffs and others may have had in the residue of the property, and the plaintiffs have no interest in the method by which a court of equity will work out the details of the trust created.

It is very strenuously insisted that the testatrix did not contemplate these trusts at all. She did contemplate, according to the evidence, that Mr. Myers should be the executor of the will, as that was discussed. Mr. Crane advised her these trusts were necessary to make the will legal, and especially as to the trust for the benefit of the poor of Martinshohe; that interest rates in Kansas were higher than interest rates in Bavaria, and that it would increase the amount of her charity given to the poor at Martinshohe to create a trust in America and keep the funds loaned here. For the purpose of disposing of this point, and for no other, we will assume that Mr. Crane was mistaken in his suggestion that a trustee was necessary in order to make the items legal; still there is nothing to indicate he was not honest in his advice. The testatrix, when the sixteenth item was read, said she wanted that money to go to the Board of Foreign Missions of the Methodist Episcopal Church at the death of Katie Grauer, and did not want it held in perpetual trust, and Mr. Crane corrected the will for the purpose of carrying out her purpose. Every word of the will was read to the testatrix, and her action in relation to the sixteenth item shows she knew and understood the appointing Myers trustee. Being of the opinion a trustee was necessary in these items, Mr. Crane asked Mr. Myers, who had already been designated by Mrs. Sitzler as executor of the will, on their way back from the consultation at the deceased's house, if he would act as trustee.

The evidence shows that Mr. Myers' relations to the parties and the estate were such that he would be the one she would naturally have selected for that office. This opinion might well end here with an affirmance; but appellants filed an elaborate argument to prove that as changed the language of item 16 is not ambiguous. Let it be conceded that upon its face it is not. Then appellants argue that, if there is an ambiguity, it is patent, not latent, and cannot be explained by parol evidence. These two positions are inconsistent with one another. In the recent case of David Graham et ux. v. National Surety Co., 244 Fed. 914, 157 C. C. A. 264, we reviewed a number of text-book authorities on this subject, and without further discussion, if, as contended, the will is not ambiguous on its face, the evidence showing clearly that the change was made for the purpose of vesting the principal of the bequest in the Board of Foreign Missions of the Methodist Episcopal Church, the instrument will be so construed, even if it becomes necessary to construe the will by other than the rules of English grammar. 2 Underhill on Law of Wills, page 1385.

It is strenuously insisted that the seventeenth and eighteenth items constitute trustees to turn the money over annually to the mayors of Martinshohe and Holton, to be by them used for the relief and assistance of the poor, and that this creates trustees of the mayors of the two places, and the use of the term "mayor" is descriptio personæ, and so the mayors for the time being take the whole interest in trust for the

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uses indicated. This might be true under the holding in Inglis v. Sailors' Snug Harbor, 3 Pet. 99, 7 L. Ed. 617, and similar cases, were it not that in each case the direction is, not only to turn over the profits of the bequest to the mayor of the town named, but to turn it over annually to the mayor of the town named. It would therefore be no defense in any year, if the mayor of the town in question should claim his annual payment, for the trustee to say that he had turned it over to some ex-mayor of 10 years before. If any part of appellants' contention in this regard is true, the subordinate trusts are annual in duration, and as many are created as there may be years in which the principal trust exists.

It is contended that, because no part of the money bequeathed goes to the charities, they are not charitable bequests. The earnings of the bequests go to the charities, and that is sufficient to stamp the character of charitable bequests upon the principal.

It is claimed that under the Constitution and laws of Kansas that state cannot provide for the poor of a city except through the county. Nearly every state by Constitution or statute prohibits the imposition of taxes for the support of churches, and yet generally it is regarded as a proper charity for a testator to give his property for the support even of sectarian churches. It is no part of the power of one by will to turn his property over for the support of a public charity, that the charity is one to which the state could contribute its support.

The decree of the District Court is right, and is affirmed.

(244 Fed. 914)

GRAHAM et ux. v. NATIONAL SURETY CO.

(Circuit Court of Appeals, Eighth Circuit. May 7, 1917.)

No. 4687.

1. HOMESTEAD ⟹118(5)—CONVEYANCE—VALIDITY.

Under Gen. St. Minn. 1913, § 6961, declaring that if the owner be married no mortgage of a homestead except for purchase money unpaid thereon, nor any sale or other alienation thereof will be valid without the signature of both husband and wife, a conveyance by a husband or wife without the spouse joining is void as to the homestead though it may be valid as to other property included therein.

2. DESCENT AND DISTRIBUTION ⟹52(2)—SURVIVING WIFE—RIGHTS OF.

Where land mortgaged by a husband alone was sold on judicial sale before his death, his widow will not, under Gen. St. Minn. 1913, § 7238, relating to descent and distribution, take any interest therein.

3. EVIDENCE ⟹451, 452—PAROL EVIDENCE RULE.

Parol evidense is admissible to explain a latent ambiguity in a deed, though not to explain a patent ambiguity, for that would practically abolish the sanctity of deeds.

4. EVIDENCE ⟹462—PAROL EVIDENCE RULE—ADMISSIBILITY.

A firm of contractors suffered considerable loss on a contract, the performance of which was guaranteed by plaintiff surety company. Thereafter one of the partners and his wife executed a trust deed in favor of plaintiff surety, reciting that the property should be held in trust for the purpose of securing the surety against any and all liability of

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⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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every kind that may arise by reason of any bond or indemnity of any kind or nature which the surety may hereafter execute indemnifying or securing, or in any manner obligating it to pay as surety or otherwise any sum of money on account of any contract of the contracting firm. The partner's wife had declined to sign a deed of trust upon the family domicile for any past indebtedness, but she executed the above deed of trust which was prepared by the surety. After execution of the deed of trust, the trustee gave indemnifying bonds to firm creditors who were induced to accept firm notes payable in one year for the claims arising under the contract. *Held*, that the deed of trust was ambiguous, and parol evidence was admissible to show its scope as to the wife.

5. HOMESTEAD ⟹115(1)—DEEDS OF TRUST—CONSTRUCTION.

In such case, as the trust deed should be most strongly construed against the trustee, it having been prepared by it, and as its agent knew of the wife's refusal to sign a deed which should subject her homestead to claims for past indebtedness, the homestead is not, despite the execution of new bonds which covered the past indebtedness, and the surety's satisfaction of claims arising on such bonds, subject to foreclosure under the deed of trust.

6. MORTGAGES ⟹114—DEEDS OF TRUST—CONSTRUCTION.

In such case, as the husband and partner consented to subjecting his homestead to past indebtedness, and as he could validly incumber other portions of his real property without the consent of the wife, such deed of trust is valid as to property other than the homestead, the husband having after the execution of the trust deed consented to the trustee's construction by executing notes for the past indebtedness to secure payment of which the trustee executed new bonds, this being particularly true as the lands were located in Minnesota, and Gen. St. Minn. 1913, § 7907, declaring that any judgment of the federal District Court shall become a lien on such lands of the judgment debtor as are located in the county where it is docketed and lands in any other county when duly docketed with the clerk of the district court in the county in which they are located, made the judgment against the husband a lien on such lands.

7. SUBROGATION ⟹7(1)—SURETY—RIGHT TO.

A surety paying an obligation of the principal is entitled to be subrogated to the rights of creditors.

Hook, Circuit Judge, and Amidon, District Judge, dissenting in part.

Appeal from the District Court of the United States for the District of Minnesota; Page Morris, Judge.

Action by the National Surety Company, a corporation, against David Graham and Mrs. Minnie A. Graham. From a decree for plaintiff, defendants appeal. Reversed and remanded, with directions to dismiss as to Mrs. Minnie A. Graham and to grant a decree of foreclosure against David Graham.

M. E. Louisell, of Duluth, Minn. (Victor L. Power, of Hibbing, Minn., on the brief), for appellants.

Oscar Mitchell, of Duluth, Minn. (W. D. Bailey and A. C. Gillette, both of Duluth, Minn., on the brief), for appellee.

Before HOOK and SMITH, Circuit Judges, and AMIDON, District Judge.

SMITH, Circuit Judge. June 28, 1910, a copartnership composed of David Graham and John J. Young, under the firm name of Graham-Young Company, entered into a written contract to build a high

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school in Gilbert, Minn., with district township No. 18 of St. Louis county, in that state, for $87,992. On July 27, 1910, the Graham-Young Company gave to the school district a bond in the sum of $87,992, being the full amount of the contract price, for the performance of said contract, with the National Surety Company as surety. The bond contained the following provisions:

"Now therefore, if the said principals shall pay as they become due all just claims for all work, tools, machinery, skill and materials furnished under said contract and shall complete said contract in accordance with its terms and shall save the obligee harmless from all costs and charges that may accrue on account of the doing of the work specified in said contract and shall comply with all laws appertaining thereto, then this obligation shall be void, otherwise to remain in full force and effect.

"This bond is given for the use of the obligee and of all persons doing work or furnishing skill, tools, machinery or materials, under or for the purpose of this contract."

Thereupon the Graham-Young Company entered upon the performance of said contract. As the building was nearing completion, it became manifest they were going to lose heavily on the contract. A meeting of the creditors was called by Mr. John C. Bennett, the superintendent of claims of the surety company for the territory that included Minnesota. An arrangement was then made that the balance in the hands of the school district should be paid pro rata to the creditors and that they should extend the time of payment of the balance for one year at 7 per cent. After crediting the amount then in the hands of the school district, there was due in the aggregate by the Graham-Young Company to their creditors on this building $13,567.71. On April 28, 1911, David Graham and his wife executed a trust deed to the National Surety Company of lots 4 and 5, block 3, Southern addition to Hibbing, according to the recorded plat thereof, and lots 2 and 3, of section 30, in township 59 north, of range 22 west, all of the above described lands being in St. Louis county, and the east half of northeast quarter of section 25, in township 59 north, of range 23 west, in Itasca county, all in the state of Minnesota. This trust deed was upon the following conditions:

"The above-described property is conveyed by the parties of the first part to the party of the second part to be held in trust for the purpose of securing the party of the second part against any and all liability of every kind and nature that may arise by reason of any bond of indemnity or other instrument of security of any kind or nature which the party of the second part may hereafter execute, indemnifying or securing, or in any manner obligating itself to pay as surety or otherwise, any sum of money on account of any contract, agreement or obligation of Graham-Young Company, a copartnership consisting of said David Graham and one John J. Young, it being understood and agreed, however, that the party of the second part does not, by accepting this security, obligate itself in any manner to execute any bond of indemnity, or other instrument of security for the said Graham-Young Company."

The National Surety Company brought suit to foreclose said trust deed in the United States District Court, and after a trial a decree was entered, September 9, 1915, that the surety company was entitled to $17,312.73 and interest and costs, and that the property described in the trust deed be sold to satisfy said claim, and the de-

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fendants in that suit, David Graham and Minnie A. Graham, his wife, appeal.

It appears that subsequent to the execution of this trust deed and on July 1, 1911, Mr. David Graham, in the name of the Graham-Young Company, executed notes to the various creditors on the Gilbert schoolhouse to the aggreate amount of $13,567.71 bearing 7 per cent. interest, and the firm of Graham-Young Company, by David Graham, and the National Surety Company, as surety, gave a bond of indemnity to each of said creditors that his note would be paid within one year of its date. The Graham-Young Company failed to pay any of the said notes, and the surety company was compelled to do so, and upon these payments the decree of the District Court is based.

The surety company was liable immediately for the whole of these claims upon its original bond which is conceded was not within the terms of the trust deed, and the principal question is as to whether by extending its liability for a year and agreeing to pay 7 per cent. interest the new bonds were bonds it "may hereafter execute," as provided in the trust deed. It appears that the trust deed covers lots 4 and 5 in block 3, Southern addition to Hibbing. Upon these lots is the homestead of the parties, and it has been actually occupied by them as such for twelve years or more.

[1] It was provided by section 3456 of the Revised Laws of Minnesota of 1905, now section 6961 of the General Statutes of Minnesota of 1913, that:

"If the owner be married, no mortgage of the homestead, except for purchase money unpaid thereon, nor any sale or other alienation thereof shall be valid without the signatures of both husband and wife."

Under this statute while a conveyance of a homestead by the husband or wife without the spouse joining is void as to the homestead, if other property be included in the same deed the instrument is not void as to such other property. Coles v. Yorks, 31 Minn. 213, 17 N. W. 341; Weitzner v. Thingstad, 55 Minn. 244, 56 N. W. 817.

[2, 3] Mr. David Graham testified: That he first had a talk with Mr. Bennett on the subject of the trust deed at Hibbing; that:

"The first time that Mr. Bennett put the proposition up to me, he outlined the trust deed to cover past indebtedness incurred by the Graham-Young Company and also to cover future business so as we could go along and do business in the future. He stated that my wife would have to sign the instrument. * * * I told Mr. Bennett that I would take the matter up with my wife, and if she would sign a deed of that kind I would do so—I was positive we could go ahead and make good. There was a lot of big contracts that were to be let on some buildings, and we thought we would stand a good show in getting those contracts. I told my wife what Mr. Bennett told me. She absolutely refused to sign any trust deed of that kind but would sign one for future business—promised to sign one if it was made to cover future business. In regard to past indebtedness she said this: 'In case you wouldn't be able to make good this is my home—we have to raise our children, and I am going to protect them.' She said at that time that she positively refused to sign any deed that would cover past indebtedness."

Mrs. Minnie A. Graham testified:

"I had a talk about this trust deed before signing it with Mr. Graham, my husband. He asked me to sign a trust deed that would cover all past indebt-

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edness and also the future. He asked me to do that at my home in Hibbing. Mr. Graham told me that Mr. Bennett said if I would sign this trust deed to cover past indebtedness he was sure that they would make good as there was another contractor that had made good and he was sure he could make good for me. I told Mr. Graham that then I would sign away everything and I did not like to sign away our home. * * * I said then our children came first and I refused to sign it."

Both Mr. Graham and Mr. Young testified that this was all communicated to Mr. Bennett at Duluth on the day of the meeting of the creditors there, and Mr. Bennett frankly admits that Graham so told him. After the meeting of the creditors, Mr. Bennett and Mr. Graham went to a lawyer's office in Duluth who was employed by Mr. Bennett for the surety company, and this lawyer drew the deed of trust in question. There is nothing in the record which in any way reflects upon him. Mr. Graham then took the deed home and told his wife that this deed was so drawn up as to cover future business. Mrs. Graham testified that her husband so told her and she then read the instrument, and, believing that it covered only future indebtedness and did not have anything to do with past indebtedness, she signed it.

It is strenuously contended that the evidence on this subject was inadmissible to vary the terms of a written instrument. We have no desire to in any manner infringe upon the well-settled and salutary rule upon that subject and do not deem it necessary to review the authorities thereon. The real question is whether the case is within the equally well-recognized exception to this rule on ambiguities and, if it is, what is the situation of the parties?

Under the laws of Minnesota, David Graham alone could have executed the trust deed in question as to all but the homestead, and if the property was sold on judicial sale before the death of the husband his widow would take no interest in it. Revised Laws of Minnesota, 3648; General Statutes of Minnesota, 7238.

The case therefore presents the question as to whether the trust deed should be construed to cover at all liabilities incurred upon bonds executed subsequent to the date of the trust deed to secure a pre-existing liability of the National Surety Company. That is, as to such liability was it a binding obligation as to either David Graham or his wife Minnie A. Graham? If the last question should be answered in the affirmative as to either of the defendants, should it be so answered as to both? Assuming the obligation to be a valid one as to one or both of the defendants, was it valid as to their homestead?

In Greenleaf on Evidence (16th Ed.) § 297, it is stated:

"It may be proper to consider the case of ambiguities, both latent and patent. The leading rule on this subject is thus given by Lord Bacon: 'Ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum, verificatione facti tollitur.' Upon which he remarks that: 'There be two sorts of ambiguities of words; the one is ambiguitas patens and the other latens. Patens is that which appears to be ambiguous upon the deed or instrument; latens is that which seemeth certain and without ambiguity, for anything that appeareth upon the deed or instrument; but there is some collateral matter out of the deed that breedeth the ambiguity. Ambiguitas patens is never holpen by averment; * * * for that were to make all deeds hollow and subject to averments, and so, in effect, that to pass without deed which

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the law appointeth shall not pass but by deed. Therefore, if a man give land to J. D. and J. S. et hoeredibus, and do not limit to whether of their heirs, it shall not be supplied by averment to whether of them the intention was (that) the inheritance should be limited.' 'But if it be ambiguitas latens, then otherwise it is; as if I grant my manor of S. to J. F. and his heirs, here appeareth no ambiguity at all. But if the truth be, that I have the manors both of South S. and North S., this ambiguity is matter in fact; and therefore it shall be holpen by averment, whether of them it was that the party intended should pass.' "

In Wigmore on Evidence, § 2472, it is said:

"Declarations of intention, though ordinarily excluded from consideration, are receivable to assist in interpreting an equivocation; that is, a term which, upon application to external objects, is found to fit two or more of them equally. This rule dates at least as far back, in recognition, as Lord Coke's time; the only difference being that it was then the sole permissory exception to a general prohibitory rule against looking at any extrinsic circumstances (as noticed ante, section 2470), while now it is a permissory exception to a prohibitory rule which is itself an exception (ante, section 2471) to a general permissory rule.

"The reason for the present exception to that exception is plain enough. The original prohibitory exception is based on the risk of allowing an extrinsic utterance of intent to come into competition with the terms of the document on the same subject, and perhaps to prevail against them (ante, section 2471). Now in the case of an equivocation this risk does not exist. Since the term of the document describes equally two objects, and since it was used to designate one only, there can be no competition with the words of the document by declarations which merely expand and make more specific those words. The sense of the words can be interpreted without restriction, because the data offered cannot be used for any purpose but that of interpretation. Hence the reason for the original prohibitory rule falls away, and the general principle of interpretation resumes its full range."

In Chamberlayne on the Modern Law of Evidence, in section 2654, it is said:

"An ambiguity in a contract may be so (by unsworn statements) explained."

In Rice on Evidence, vol. 1, p. 276, it is said:

"A latent ambiguity created by parol proof is open to explanation, and this in no sense infringes upon the rule that a written contract cannot be altered by parol, but that such writing is to be deemed to express the intent of the parties; where such an ambiguity is created by the parol evidence in the case it may be explained by any evidence, written or unwritten, within the reach of the parties."

See Jones on Evidence, § 453 et seq., Id., §§ 472 and 473.

[4] The trust deed recited that it was given to secure the surety company against all liability that may arise on any bond it may hereafter execute. That seems plain and unambiguous, but when it appears that the surety company had previously executed a bond upon which its liability had arisen in the past and after the execution of the trust deed it in effect renewed the old bond and signed some new ones wholly independent of this transaction, and it claims that the renewal bonds were hereafter executed and its liability arose on the renewals, it becomes manifest that there are two ambiguous phrases used in the contract. This deed of trust was for the purpose of securing against all liability that may arise. The liability of the company having already arisen under the prior bond, can it be said that

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its renewed liability upon the new bond was within the language may arise, and when the two thoughts are coupled together that the trust deed is to secure liability that may arise on bonds hereafter executed it becomes plain that the deed of trust contained an ambiguity as to whether these new bonds were included therein. Not only does an ambiguity appear, but an ambiguity "latens" as distinguished from an ambiguity "patens." Did the trust deed apply to only one class of bonds "hereafter" executed and having their origin after the deed or did it include those and any renewal bonds executed after and for old pre-existing debts at the time of the execution of the trust deed?

[5] This contract was drawn by the National Surety Company by its attorney and upon direction of the superintendent of its claims department and must be most strongly construed as against it. With the evidence offered there can be no doubt that Minnie A. Graham, the wife, had no idea that the contract was subject to the second construction indicated, and there was no reason why she should have such idea when she read and signed the instrument. Properly construed as against her, the trust deed secured only bonds or other instruments executed in the future and did not include re-execution of bonds to secure pre-existing debts upon other bonds and the liability on new bonds could not be said to arise on them, but it originally arose on a bond "heretofore" executed and renewed and re-evidenced by the new bond. While there was nothing fraudulent in the execution of the contract, as the company knew that she had refused to sign this trust deed to secure the indebtedness on the high school, the attempt of the company after the execution of the deed to make antecedent obligations into subsequent obligations would operate as a fraud and would not be tolerated. The plaintiff therefore was not entitled to a decree as against her or as against the homestead for the amount it paid upon the individual bonds given to secure the debts upon which it was liable at the date of the execution of the trust deed upon the bond of the 27th of July, 1910. See United States v. Bethlehem Steel Co., 205 U. S. 105, 27 Sup. Ct. 450, 51 L. Ed. 731; Lowrey v. Hawaii, 206 U. S. 206, 221, 27 Sup. Ct. 622, 51 L. Ed. 1026. A more difficult question arises with reference to defendant David Graham and the property other than the homestead.

[6, 7] That David Graham is liable for the amount paid by the National Surety Company upon the obligations of the Graham-Young Company is beyond dispute. The bill sets forth the execution of the several bonds by the Graham-Young Company, which was a partnership of which David Graham was a member, by David Graham as principal, and by the National Surety Company as surety, and the default of the principals and the payment on the notes the bonds were to secure by the surety company, and prayed the foreclosure of the trust deed and to have judgment for any deficiency after applying the proceeds of the trust deed, against both defendants, and for general equitable relief. Included in the prayer was necessarily a prayer for subrogation to which the surety company was clearly entitled. Cooper v. Jewett, 233 Fed. 618, 147 C. C. A. 426. We have no doubt of the court's power to render a decree against David Graham for the amount paid by the surety company on the obligations of the firm

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of which he was a member upon which it was surety. A more difficult question arises as to the validity of the trust deed as between the surety company and David Graham as to this indebtedness. He never objected at any time to giving on his own behalf a trust deed to secure past indebtedness, and he could alone mortgage any property other than the homestead although it is probable that if he died before judicial sale under foreclosure his widow would have been entitled to a distributive share in the property under General Statutes of Minnesota, 7238. His wife, for aught that appears, had no knowledge that it was planned to give new bonds for the old ones but David Graham, with presumptive knowledge of the terms of the deed of trust, executed in the name of his firm the new bonds upon which this suit is brought. These new bonds were within the very terms of the trust deed as "hereafter" executed. By so doing he acquiesced in the construction of the surety company as to the meaning of the trust deed. If it is thought that there is any inconsistency in construing this trust deed to cover only new obligations as to Minnie A. Graham but to include pre-existing debts as to David Graham, the explanation is to be found in the different evidence as to these parties. The moment that it is conceded that parol evidence is admissible to aid in construing a latent ambiguity, it necessarily follows that the finding of facts may not be the same as to all the parties as the evidence may not be alike as to them all. Perhaps a fair illustration may be found in a criminal case against two parties for a joint offense. Take for example adultery. If one of them is guilty, in the absence of force both must be guilty, but it does not follow that both must be convicted or both acquitted. The evidence may be sufficient to justify a conviction against one and not against the other. In addition to other pointed evidence but not enough to require conviction, one of the parties may have made no declaration on the subject at all, while the other may have expressly admitted the illicit commerce. Clearly a jury should convict the latter and acquit the former. State v. Caldwell, 8 Baxt. (Tenn.) 576; Alonzo v. State, 15 Tex. App. 378, 49 Am. Rep. 207. So, having found that the trust deed contains a latent ambiguity, we find the evidence requires a finding as against Minnie A. Graham and the homestead that the contract was only with reference to new bonds "hereafter" executed, but as to David Graham we find that he was willing in the first place to give security for pre-existing debts and subsequently executed new bonds for pre-existing debts with the National Surety Company as surety and thereby acquiesced in the construction of the surety company that the ambiguity should be solved as contended by it.

Entirely aside, however, from this question, the lands covered by the trust deed are all in either St. Louis or Itasca counties in the state of Minnesota. They are both in the Fifth Division of the Minnesota District Court, and the court in which this case was tried is held in St. Louis county, while Itasca joins it immediately on the west. It is provided by section 7907 of the General Laws of Minnesota that:

"Every judgment requiring the payment of money rendered in a Circuit or District Court of the United States within this state shall be, from the docketing thereof in said court, a lien upon the real property of the judgment debtor

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situated in the county in which it is so docketed, the same as a judgment of a state court. And a transcript of such docket may be filed with the clerk of the District Court of any other county, and shall be docketed in his office as in the case of judgments of the state courts, and with like effect."

If a decree was therefore entered in this case for the National Surety Company against David Graham for the amount due it on their bonds which it would clearly be entitled to, it would at once become a lien on the lands in St. Louis county and become a lien on the lands in Itasca county with the filing and docketing of the judgment with the clerk of the state district court.

There is no proof that there have been any intervening rights and there seems therefore to be no possible prejudice to any other person in holding that the trust deed is valid as against David Graham and the lands other than the homestead.

It is therefore ordered that the case be reversed and remanded, with directions to the District Court to set aside the decree heretofore rendered and to dismiss this case as to the homestead and as to Minnie A. Graham and grant a decree of foreclosure for the amount paid by the National Surety Company upon the bonds executed by it as surety for the Graham-Young Company, with the protest fees, interest, and costs, against David Graham and the property other than the homestead.

HOOK, Circuit Judge (dissenting in part). I am unable to concur in the reversal of the decree below as to the homestead. I think the trial court was right in all respects; that all parties knew the terms of the adjustment with the creditors and what the surety company was to do and what was intended by the mortgage; also, that the terms of the mortgage were not latently ambiguous but conformed precisely to the intention and understanding.

AMIDON, District Judge. I concur in that part of the foregoing opinion which reverses the decree of the trial court as to the homestead, but I am of the opinion that the reasoning which compels that result also compels a reversal of the entire decree.

A careful consideration of the trust deed and of the evidence convinces me that it was the intent of Mr. Bennett and of Graham and Young that the trust deed should not secure the indebtedness for the Gilbert schoolhouse. That question was paramount in the negotiation of the parties for a considerable time prior to the meeting of the creditors and prior to the preparation of the trust deed. Mr. Bennett testified frankly that he understood that Mrs. Graham refused to mortgage her homestead to secure the indebtedness for the Gilbert school. That subject was fully discussed both before and after the meeting of creditors. Nothing passed between the parties to justify the inference that it was ever the intent of either Mr. Bennett or Mr. Graham that the deed should be binding upon Mr. Graham but not upon his wife. Or that it should not be a lien upon the homestead but should be a lien upon the other tracts described in it. The agreement for the giving of the notes to the creditors and the securing of

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the same by a bond to each creditor, signed by the firm and by the surety company, as surety, was fully settled at the meeting of the creditors, and agreed to by all parties. This was before the trust deed was executed. I am unable, therefore, to see how the signing of the notes and of the bond securing the same by Mr. Graham can be given any ex post facto effect to modify the terms of the trust deed.

I am therefore of the opinion that the decree of the trial court should be reversed with directions to dismiss the bill.

(244 Fed. 923)

KANAKANUI et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. August 6, 1917.)

No. 2935.

1. EMINENT DOMAIN ⟹246(2)—"TAKING" OF PROPERTY—ABANDONMENT OF PROCEEDING.

The institution and prosecution by the United States of a proceeding for the condemnation of property is not a "taking" of the property, and the proceeding may be abandoned at any time.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Taking.]

2. EMINENT DOMAIN ⟹122—COMPENSATION FOR PROPERTY TAKEN—"JUST COMPENSATION."

"Just compensation" means the full equivalent for the property taken.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Just Compensation.]

3. EMINENT DOMAIN ⟹167(1)—CONDEMNATION PROCEEDINGS BY UNITED STATES—CONFORMITY TO LOCAL LAWS.

The provision of Act Aug. 18, 1890, c. 797, § 1, 26 Stat. 316 (Comp. St. 1916, § 6911), that proceedings for the condemnation of property for military purposes shall be prosecuted in accordance with the laws of the states wherein they are instituted, applies only to matters of procedure.

4. EMINENT DOMAIN ⟹246(4)—CONDEMNATION PROCEEDINGS BY UNITED STATES—EFFECT OF ABANDONMENT.

Rev. Laws Hawaii 1905, § 505, providing that, unless an award of damages made in condemnation proceedings shall be paid within two years, the defendant shall be entitled to recover his costs, reasonable expenses, and damages sustained, does not apply to a proceeding by the United States to condemn property for a public use, and any expense or damages sustained by the defendant in such case, where the proceeding is abandoned, is damnum absque injuria.

In Error to the District Court of the United States for the Territory of Hawaii; Chas. F. Clemons, Judge.

Action by S. M. Kanakanui, William R. Castle, and William R. Castle, as trustee for S. M. Kanakanui, against the United States. Judgment for the United States, and plaintiffs bring error. Affirmed.

The court below sustained a demurrer to the complaint of the plaintiffs in error in an action which they brought against the United States, in which it was alleged that in a prior action between the same parties the United States had sought to condemn, for the erection of a military post and fortification, a tract of land consisting of 4.3 acres, together with water, riparian, and fish-

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ing rights, belonging to the plaintiffs in this action; that in said condemnation suit it was finally decreed that, upon payment into the registry of the court of the sum of $5,000, all the right, title, and interest of the owners of said property should vest absolutely in the United States; that said money has not been paid, or any part thereof; that two years have elapsed since final judgment; that all the rights of the United States in the judgment have been lost to it; that at no time during said two years following said final judgment did the United States notify the plaintiffs, or either of them, that it did not claim under said judgment, "but at all times did suffer said judgment to remain, and did claim under the same"; that the plaintiffs paid the sum of $1,100 attorney's fees in the preparation of their defense to said condemnation suit and the trial thereof, and the further sum of $64.85 for witness fees, and other expenses, all of which were reasonably incurred; and that they were damaged in the sum of $5,000 for the loss of the use of said property. For these sums, and for interest, the plaintiffs demanded judgment under the provisions of Act March 3, 1887 (24 Stat. 505, c. 359), known as the Tucker Act, and under the provisions of section 505 of the Revised Laws of Hawaii of 1905, which provides as follows: "The plaintiff must within two years after final judgment pay the amount assessed as compensation or damages; and upon failure so to do all rights which may have been obtained by such judgment shall be lost to the plaintiff; and if such payment shall be delayed more than thirty days after final judgment, then interest shall be added at the rate of seven per cent. per annum. Such payment shall be made to the clerk of the court rendering the judgment, who shall distribute the same in accordance with the order of the court. If the plaintiff shall fail to make such payment as aforesaid, the defendant shall be entitled to recover his costs of court, reasonable expenses and such damage as may have been sustained by him by reason of the bringing of the action."

David L. Withington, of Honolulu, T. H. (William R. Castle, W. A. Greenwell, and Alfred L. Castle, all of Honolulu, T. H., of counsel), for plaintiffs in error.

John W. Preston, U. S. Atty., and Ed. F. Jared, Asst. U. S. Atty., both of San Francisco, Cal., and S. C. Huber, U. S. Atty., of Honolulu, T. H.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1, 2] The only limitation upon the power of the United States to exercise the right of eminent domain is that just compensation shall be made for property taken. Just compensation means the full equivalent for the property taken. Monongahela Navigation Co. v. United States, 148 U. S. 312, 326, 13 Sup. Ct. 622, 37 L. Ed. 463. By the terms of the judgment of condemnation as it is here pleaded, and by the rule sustained by the weight of authority, there was no taking of the property which was sought to be condemned. Lewis on Eminent Domain, (3d Ed.) § 655. The United States had the right to and did abandon the proceeding. The complaint in the present action clearly shows that the plaintiffs suffered substantial damage by reason of the action of the defendant, and it must be conceded that the statute of Hawaii is just and equitable, in that it permits recovery for such damages.

[3] The question here, however, is whether the United States has subjected itself to liability under that statute. Congress might have enacted that the condemnation suit be conducted according to common law, or by a procedure wholly irrespective of that of the territory of

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Hawaii. By the act of August 18, 1890 (26 Stat. 316), Congress made the general provision under which the condemnation suit was brought, which was that condemnation shall be conducted in accordance with the laws relating to suits for the condemnation of property of the states wherein the proceedings may be instituted. By virtue of that statute the federal courts are required to follow the local practice, pleadings, forms, and proceedings so enjoined. They are not required to observe any provision concerning any matter of substance prescribed in the local procedure. Such is the doctrine of the decisions wherever the question has arisen. Thus Judge Wallace held that the requirements of a local statute that there must first be a reasonable attempt to acquire the land by purchase is a matter of substance, and not of form, practice, or pleading, and need not be regarded by a federal court. In re Secretary of Treasury (C. C.) 45 Fed. 396, 11 L. R. A. 275. In that case it was said:

"The right of eminent domain may be exercised by the general government within the several states without their permission, and cannot be trammeled by any obnoxious restrictions by state laws, and, in the absence of regulation by Congress, may be asserted by any method to obtain lands for public use which was recognized as appropriate when the federal Constitution was adopted."

So in High Bridge Lumber Co. v. United States, 69 Fed. 320, 16 C. C. A. 460, Judge Lurton said:

"It is not to be conceived that Congress intended that a legislative requirement, giving to an owner consequential damages when his land was sought to be appropriated by a railroad company, should have application when the United States undertakes to condemn land necessary for the improvement of navigation."

In Carlisle v. Cooper, 64 Fed. 472, 12 C. C. A. 235, the court held that condemnation procedure prescribed by Act Aug. 1, 1888, c. 728, 25 Stat. 357 (Comp. St. 1916, §§ 6909, 6910), added nothing to Conformity Act June 1, 1872, c. 255, 17 Stat. 196, and said:

"It has never been supposed that the act of June 1, 1872, was intended as a consent by Congress to waive the immunity of the government from judgments for damages or costs. * * * Congress could not have supposed that its remedial legislation would permit judgments against the government for damages or costs."

In Luxton v. North River Bridge Co., 147 U. S. 337, 13 Sup. Ct. 356, 37 L. Ed. 194, it was said that the act of June 1, 1872, must—

"give way whenever to adopt state practice would be inconsistent with the terms, and defeat the purpose, or impair the effect, of any legislation of Congress."

In Transportation Co. v. Chicago, 99 U. S. 635, 642, 25 L. Ed. 336, the court said:

"But acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the state or its agents, or give him any right of action This is supported by an immense weight of authority."

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[4] The plaintiffs contend that the action is maintainable under the Tucker Act as an action to recover damages in a case "not sounding in tort." It is true that under the allegations of the complaint the case does not sound in tort, for it is not alleged that the condemnation suit was not brought or prosecuted in good faith, and no negligence is imputed to the officers of the government. But the controlling fact is that the claim for damages rests wholly upon a local statute. Such a statute cannot create a liability against the United States. If, as an incident to the right which the United States properly exercised to condemn property to a public use in a proceeding which was subsequently abandoned, the defendants were required to incur expenses, or were incidentally injured, it was a case of damnum absque injuria, and comes within—

"the universally recognized principle of law which exempts from liability for loss or damage incidentally resulting from the proper exercise of a legal right." Ford v. Park Com'rs, 148 Iowa, 1, 126 N. W. 1030, Ann. Cas. 1912B, 940; Petition of Pittsburgh, 243 Pa. 392, 90 Atl. 329, 52 L. R. A. (N. S.) 262; United States v. Dickson (C. C.) 127 Fed. 774; McCready v. Rio Grande Western Ry. Co., 30 Utah, 1, 83 Pac. 331, 8 Ann. Cas. 732.

The judgment is affirmed.

(244 Fed. 926)

MITCHELL, United States Marshal, v. DEXTER.

(Circuit Court of Appeals, First Circuit. June 27, 1917.)

No. 1286.

1. COURTS ⟹266—FEDERAL COURTS—ISSUANCE OF PROCESS—TERRITORIAL LIMITATIONS.

A contempt proceeding originated in a petition brought by the complainants in an equity suit, alleging a violation by the defendants of an injunction granted in such suit and asking that defendants be ordered to appear and show cause why they should not be attached and punished for contempt for such violation. Such an order to show cause was issued and served, and answers filed, and thereafter a notice, signed by plaintiff's solicitors, was addressed to those for defendants, stating that the petition and answer in the contempt proceedings pending in "said cause" would be called up for hearing, and that the depositions of certain defendants would be read and one of the defendants examined. An order was entered, reciting the various proceedings, finding that certain of the defendants had violated the injunction, and ordering that an attachment issue for their arrest. All of such orders and papers were entitled and numbered in the equity suit. *Held*, that the proceeding was civil in its nature, and, under Judicial Code (Act March 3, 1911, c. 231) § 51, 36 Stat. 1101 (Comp. St. 1916, § 1033), providing that, except as otherwise provided, no person shall be arrested in one district for trial in another in any civil action, the District Court for the Eastern District of Wisconsin had no authority to issue its writ to the marshal for the district of Massachusetts for the arrest of certain defendants and their removal to Wisconsin.

2. COURTS ⟹266—FEDERAL COURTS—ISSUANCE OF PROCESS—TERRITORIAL LIMITATIONS.

Judicial Code, § 262 (Comp. St. 1916, § 1239), authorizing the District Courts to issue all writs not specifically provided for by statute which may be necessary for the exercise of their respective jurisdictions and

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agreeable to the usages and principles of law, did not authorize the Wisconsin court to issue its writ for the arrest of defendants in Massachusetts and their removal to Wisconsin, even though the proceeding was a criminal one, as that section does not authorize the issuance of process to run beyond the limits of the court's territorial jurisdiction, but merely designates the form or character of writs which the court may issue within such territory.

Appeal from the District Court of the United States for the District of Massachusetts; Frederic Dodge, Judge.

Habeas corpus by Alvin S. Dexter against John J. Mitchell, United States Marshal. From a decree discharging the petitioner, the respondent appeals. Affirmed.

Sherman L. Whipple and Alexander Lincoln, both of Boston, Mass. (George W. Anderson, U. S. Atty., Daniel A. Shea, Asst. U. S. Atty., and Leo A. Rogers, all of Boston, Mass., on the brief), for appellant.

Robert Cushman, of Boston, Mass. (Odin Roberts, Charles D. Woodberry, and Roberts, Roberts & Cushman, all of Boston, Mass., on the brief), for appellee.

Before BINGHAM, Circuit Judge, and BROWN and MORTON, District Judges.

BINGHAM, Circuit Judge. The questions in this case arise on the petition of Alvin S. Dexter, of Manchester, in the district of Massachusetts, for a writ of habeas corpus. In the court below a writ of habeas corpus was issued and the marshal made his return, in which he set forth that he arrested and took Dexter into custody by virtue of process issued by the District Court of the United States for the Eastern district of Wisconsin, a copy of which he annexed thereto.

By the writ it appears that the process was issued from the District Court for the Eastern district of Wisconsin, directed to the marshal for the district of Massachusetts, or his deputy, or either of them, directing them to take Dexter and others mentioned, if found in the Massachusetts district, and have them before the court for the Eastern district of Wisconsin, that they might be dealt with according to law. It recites that Dexter and others named in the writ had been adjudged guilty of contempt of the District Court in Wisconsin, in that they had violated the injunctional order of the court of August 9, 1916, in a case therein pending, entitled "North American Chemical Company and George H. Maxwell, Plaintiffs, v. Alvin S. Dexter, Dexter Manufacturing Company, Fibrehide Filler Company, Braintree Rubber Cement Company, Joseph E. Peckham, A. B. Alden, Henry G. Halloran and Harry Wilson, Defendants"; that the court issued a writ of attachment for the arrest of said persons, directed to the marshal of the Western district of Wisconsin, requiring them to be brought before the court; that the marshal made a return upon the writ that he was unable to find said persons within his district, and that he believed them to reside in or near Boston, in the Massachusetts district, and could there be found.

In the court below it was assumed, for the purposes of the case, that the contempt proceeding, instituted in the District Court of Wis-

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consin for the violation of the injunctional order, was criminal; and it was held that section 262 of the Judicial Code (R. S. § 716 [Comp. St. 1916, § 1239]) did not authorize the issuance of a writ in a criminal case for the arrest of a citizen of one judicial district, while within that district, and his removal to the judicial district of another state. An order discharging the petitioner was entered, and this appeal was taken.

In the argument of the case upon this appeal, it was conceded that, if the contempt proceeding was civil in nature, the court did not err in discharging the petitioner. Judicial Code, § 51; R. S. § 739 (Comp. St. 1916, § 1033); Toland v. Sprague, 12 Pet. 300, 328–330, 9 L. Ed. 1093; Ex parte Graham, Fed. Cas. No. 5,657; Picquet v. Swan, Fed. Cas. No. 11,134. But it was contended on behalf of the appellant that the proceeding was criminal in nature, and the District Court for Wisconsin was authorized to issue its writ to the marshal of Massachusetts for the arrest and removal of Dexter to Wisconsin under the authority conferred by section 262 of the Judicial Code (R. S. § 716).

[1] As bearing upon the nature and purpose of the contempt proceeding, evidence was introduced from which it appeared that the original proceeding in which the injunctional order was made was an equity suit numbered 684, brought by the North American Chemical Company and George H. Maxwell against Alvin S. Dexter, Dexter Manufacturing Company, Fibrehide Filler Company, Braintree Rubber Cement Company, Joseph E. Peckham, A. B. Alden, Henry G. Halloran, and Harry Wilson, alleging infringement of certain letters patent; that the contempt proceeding originated in a petition brought by the North American Chemical Company and George H. Maxwell against the defendants named in the equity suit; that the petition was also numbered 684 and filed in said suit; that it contained a recital setting forth the proceedings in the equity suit, to wit, the appearance and answers of the defendants and the injunctional order, and alleged that the defendants, in disregard and defiance of the injunction and in contempt of the authority of the court, had continued to infringe the letters patent. In the concluding paragraph the petitioners prayed that the defendants be ordered to appear before the court and show cause why they "should not be attached and punished for contempt of court" for violating the injunction. Upon the petition being filed an order was issued, also numbered 684 and entitled as of the equity suit, directing the defendants to appear before the court to show cause "why they should not be attached and punished for contempt of court," and that the defendants be served with a copy of the petition and order. The petition and order to show cause having been served, an order was entered on the 14th day of October, 1916, entitled as of the equity suit, directing the defendants to answer or demur to the petition not later than October 18, 1916, and that a hearing be had thereon October 28, 1916. Answers to the petition, entitled as of the equity suit, were filed in said cause on the 18th and 20th of October, 1916; and on October 25, 1916, a notice, entitled as of the equity suit and signed by the "solicitors" for the plaintiffs, was addressed to the "solicitors" for the defendants, notifying them that on October

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28th, they should call up for hearing and disposition before the court "the petition and the answer thereto in the contempt proceedings now pending in said cause, and that we shall read in support of said petition the depositions of Joseph E. Peckham, Henry G. Halloran, and Alvin S. Dexter on file in said cause, and shall call and examine as witness, Harry Wilson, one of the defendants in said cause, and shall read in support of said petition the affidavits of Oliver D. Hogue and Frank O. Hatch." Under date of October 28, 1916, an order was entered, entitled as of the equity suit, in which it was recited that the plaintiffs and defendants, by their counsel, appeared before the court under the rule to show cause, and the matter came on to be heard on the petition and answers and the depositions taken in the cause and testimony in open court, and, the matter having been argued and submitted, it was ordered that Harry Wilson be discharged, and that, as to the other defendants, the plaintiffs will prepare findings holding them guilty of contempt of court. December 9, 1916, an order drafted in pursuance of the order of October 29, 1916, entitled as of the equity suit, was filed, which, after reciting the various proceedings had with reference to the petition for contempt, including the hearing, the reading of the depositions, affidavits, etc., and a finding that the defendants had deliberately and willfully violated the injunction of the court, it was ordered that "an attachment issue forthwith for the arrest of the defendants, and that they be brought before the court to do and receive what the court may further order and decree in the premises."

In Gompers v. Buck Stove & Range Co., 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874, the question was presented whether the proceeding for contempt in that case was civil or criminal, and, after adverting to the fact that "the alleged contempt did not consist in the defendants refusing to do any affirmative act required, but rather in doing that which had been prohibited," and that all the sentences imposed were for fixed terms in jail for 6, 9, and 12 months, which sentences, under the circumstances, did not afford remunerative relief to the complainant, but were wholly punitive, the court proceeded to consider the nature of the proceeding in which the punishment was imposed for the purpose of determining whether the punishment was one which it could impose; and, having arrived at the conclusion that the proceeding was one in equity for civil contempt where, under the circumstances of the case, there could be no coercive imprisonment, and the only remedial relief possible was a fine payable to the complainant, it held that the punishment imposed was without authority.

The facts in that case, which led the court to the conclusion that the proceeding for contempt was civil, and not criminal, differ in no material respect, save one, from those in this case. All the proceedings, orders, and decrees there, as here, were entitled as in the original equity suit, and the proceeding was prosecuted throughout by the complainants, and not by the law officer of the government. There, as here, the defendants were required to testify against themselves, a thing which they would not have submitted to, and the court would not have required, if it had been understood that the proceeding was

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criminal, and not civil; for, as stated in the Gompers Case (221 U. S. at page 444, 31 Sup. Ct. at page 499, 55 L. Ed. 797, 34 L. R. A. [N. S.] 874):

"In proceedings for criminal contempt the defendant is presumed to be innocent, he must be proved to be guilty beyond a reasonable doubt, and cannot be compelled to testify against himself."

To the extent that the petition prays that the defendants "should show cause * * * why they * * * should not be attached and punished for contempt of court" it does not differ from the prayer in the Gompers Case. The petition in the latter case, however, contained the additional prayer "that petitioner may have such other and further relief as the nature of its case may require," indicating that it was seeking remedial relief. But, inasmuch as a petition for contempt, whether civil or criminal, must contain a prayer that the defendant be attached and punished for the alleged contempt (Gompers v. Buck Stove & Range Co., supra, 221 U. S. at p. 441, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. [N. S.] 874), the most that can be said for the prayer in the present petition is that it is equivocal and without force as evidence bearing upon the character of the proceeding.

There is, however, in this case an additional piece of evidence not present in the Gompers Case, to wit, the notice of October 25, 1916, sent by the solicitors for the plaintiffs to the solicitors for the defendants, notifying them that they should call up for hearing and disposition before the court "the petition and answer thereto in the contempt proceedings now pending in said cause," meaning the original equity cause, which is very persuasive as to what counsel and the parties understood was the nature of the proceeding.

See, also, as bearing on this question, In re Kahn, 204 Fed. 581, 123 C. C. A. 107; Stewart v. United States, 236 Fed. 838, 150 C. C. A. 100.

We are therefore of the opinion that the proceeding for contempt was civil in its nature, and that the District Court of Wisconsin was without authority to issue the writ for the arrest of the petitioner in the district of Massachusetts.

[2] But, if it could be found that the petition for contempt was a criminal proceeding at law, we are still of the opinion that the District Court of Wisconsin was without authority under section 262 of the Judicial Code (R. S. § 716) to issue its writ for the arrest of Dexter in Massachusetts and his removal to the district of Wisconsin.

The Court of Appeals for the District of Columbia, in Palmer v. Thompson, 20 App. D. C. 273, expressly held that, in the absence of an act of Congress conferring the power, the federal court in one district had no authority in a criminal case to issue its writ to the marshal of another federal district, commanding him to arrest a person within his jurisdiction, but outside that of the court issuing the writ, and that such power was not conferred by section 716 of the Revised Statutes. What is said in Re Christian (C. C.) 82 Fed. 885, as to the power of a court under this section of the statute, was disapproved by the Court of Appeals in the Palmer Case, and we do not regard it as authority upon the proposition here in question.

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Furthermore, we do not think section 262 of the Code (R. S. § 716; Judiciary Act Sept. 24, 1789, c. 20, § 14, 1 Stat. 73) gives authority to a federal District Court to issue processes to run beyond the limits of the territory in which it is established, but rather that it is a designation of the form or character of writs which such court may issue within the territory where it is established. Hills & Co. v. Hoover, 220 U. S. 329, 336, 337, 31 Sup. Ct. 402, 55 L. Ed. 485, Ann. Cas. 1912C, 562; McClellan v. Carland, 217 U. S. 269, 279, 30 Sup. Ct. 501, 54 L. Ed. 762.

Entertaining these views, we are of the opinion the court below did not err in discharging the petitioner.

The decree of the District Court is affirmed, with costs to the appellee.

(244 Fed. 931)

DAVIS et al. v. CARNEGIE STEEL CO.

(Circuit Court of Appeals, Sixth Circuit. October 2, 1917.)

No. 2983.

1. APPEAL AND ERROR ⟹927(7)—REVIEW—DIRECTED VERDICT—PRESUMPTIONS.

On appeal from a judgment on a directed verdict for defendant, it must be assumed that plaintiffs' testimony is true, and plaintiffs are entitled to the benefit of every fair inference therefrom.

2. DAMAGES ⟹190—SUFFICIENCY OF EVIDENCE—LOSS OF PROFITS.

In an action for breach of an agreement by defendant that plaintiffs could have two large dumps of furnace slag for keeping the slag out of defendant's way, evidence as to the value of crushed slag was not a sufficient basis for a recovery for loss of profits, in the absence of evidence as to the cost of crushing and marketing the slag; it appearing that a considerable portion required such treatment to make it marketable.

3. DAMAGES ⟹176—EVIDENCE ⟹317(6)—ADMISSIBILITY OF EVIDENCE—LOSS OF PROFITS—HEARSAY.

Testimony, based on inquiries at Detroit, that there was a given profit per ton at that place in handling and marketing slag, was properly excluded, where there was no showing that the profits derivable from treating and marketing the dumps in question bore sufficient relation to the profits derivable from the uses to which the slag was put in Detroit; and, moreover, such testimony was secondhand information.

4. DAMAGES ⟹190—SUFFICIENCY OF EVIDENCE—LOSS OF PROFITS.

Evidence that the value of the slag in the two dumps was in excess of $2,500 was not sufficient to support a verdict for $2,500 damages, in the absence of any evidence as to what it would have cost plaintiffs to perform their duty of keeping the slag out of defendant's way, not only during the time when there was a demand for slag, but during the entire year.

5. DAMAGES ⟹190—SUFFICIENCY OF EVIDENCE—LOSS OF PROFITS.

Evidence as to the price quoted by defendant on rough slag, uncrushed and unscreened, delivered f. o. b. cars to certain railroads, would not support a recovery for loss of profits, in the absence of evidence as to the cost of delivery to such railroads, or evidence that there was a market at that price for the full amount of slag.

6. APPEAL AND ERROR ⟹719(8)—ASSIGNMENT OF ERRORS—NECESSITY.

A judgment will not be reversed for failure to allow nominal damages, in the absence of a specific assignment or complaint on that ground.

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7. FRAUDS, STATUTE OF ⟹63(1), 72(1), 82—NATURE OF PROPERTY—"GOODS."
Where defendant orally agreed to turn over a slag-crushing plant to plaintiffs, to be operated by them, and to give them two large dumps of slag, covering several acres of ground, if they would remove the slag and keep the slag dumped by defendant out of defendant's way, the agreement was either a grant of, or contract for, an interest in lands, tenements, or hereditaments, within the statute of frauds (Gen. Code Ohio, §§ 8620, 8621), or a contract for the sale of goods, within section 8384, in view of section 8456, defining "goods" as embracing all chattels and personalty other than things in action or money.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Goods.]

8. FRAUDS, STATUTE OF ⟹83—NATURE OF CONTRACT—SALE OR MANUFACTURE.
The contract was not one of manufacture by plaintiffs for defendant, but one for the passing of title in payment for services, as defendant was not concerned with the crushing of the slag, except as a means for getting it out of the way, and the fact that payment was to be made in services, rather than in money, did not take the case out of the statute.

9. FRAUDS, STATUTE OF ⟹90(1)—SALES OF GOODS—ACCEPTANCE AND RECEIPT.
Under Gen. Code Ohio, § 8384, subsec. 1, providing that a contract to sell, or a sale, of goods or choses in action of the value of $2,500 or upwards, shall not be enforceable, unless the buyer shall accept part of the goods and actually receive them, or give something in earnest, etc., and subsection 3, providing that there is an acceptance when the buyer, before or after delivery, expresses his assent to become the owner of the specific goods, an acceptance of the goods without actual receipt is insufficient.

10. FRAUDS, STATUTE OF ⟹130(1)—EFFECT OF STATUTE—CONTRACTS IN PART WITHIN STATUTE.
Where defendant agreed to turn over a slag-crushing plant to plaintiffs, and to give them two large dumps of slag, for removing the slag and keeping that dumped by defendant out of its way, but the agreement was not in writing, and plaintiffs had rendered no services under it, no recovery could be had for its breach; an essential part of the entire contract being void.

In Error to the District Court of the United States for the Northern District of Ohio; John H. Clarke, Judge.

Action by Frank B. Davis and another against the Carnegie Steel Company. Judgment for defendant, and plaintiffs bring error. Affirmed.

Theodore A. Johnson, of Youngstown, Ohio, and Warren Thomas, of Warren, Ohio, for plaintiffs in error.

C. A. Manchester and Hine, Kennedy & Manchester, all of Youngstown, Ohio, and Squire, Sanders & Dempsey, of Cleveland, Ohio (Leroy A. Manchester, of Youngstown, Ohio, and Wm. C. Boyle, of Cleveland, Ohio, of counsel), for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. Defendant in error (defendant below) had at its McDonald site, near Girard, Ohio, a large dump of furnace slag, amounting to many thousand tons and covering several acres; it had in connection with its Ohio steel plant, near Youngstown (a few

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miles from the McDonald site), another slag dump, much larger than the one at the latter site. Its daily dump of slag from the Ohio plant alone was from 1,000 to 1,500 tons. Plaintiffs brought suit to recover damages for the breach of an alleged oral contract, whereby defendant, in consideration of plaintiffs' agreement to remove from defendant's premises the two piles of slag, and to keep out of defendant's way the furnace slag dumped by defendant at both sites, agreed to put in a slag-crushing plant and turn the same over to plaintiffs, to be operated by them; they to have the slag to dispose of as they pleased.

Plaintiffs' testimony showed that prior to the making of the alleged contract there had been conferences between plaintiffs and defendant's engineers looking to the installation by plaintiffs on defendant's premises of a slag-crushing plant, estimated by plaintiffs to cost about $75,000, for the crushing and removal of the slag dumps. There is no claim that any contract was entered into until plaintiffs' subsequent interview with defendant's president in November, 1912, at the close of which interview defendant's president is alleged to have said: "It would never do to have you put a slag-crushing plant on our ground; * * * you need screens and crushers; there is a steam shovel up there; we will put the plant in there, and you can have the slag so long as you keep it out of our way." To which plaintiffs replied: "We will keep the slag out of your way. * * * We are satisfied to go ahead and keep the slag out of your way." Thereupon defendant's president said: "This is out of the wind." This comprises the express proof of the contract relied upon. The alleged contract is interpreted by both plaintiffs as requiring the slag (including daily product) to be kept out of defendant's way; by one as requiring the removal of accumulations at both sites, if defendant so desired; by the the other as permitting it (at plaintiffs' option), but not requiring it.

The alleged arrangement was entirely oral; it was never subsequently reduced to writing; no payment was ever made to bind the alleged bargain; nothing was ever done under it; no part of the slag was ever delivered to or received by plaintiffs. On the contrary, the defendant built a crushing plant and operated it on its own account; plaintiffs never had any possession of, or anything to do with, defendant's plant, or with its appurtenances, equipment, or operation.

The defendant, by its answer, denied the alleged contract in toto, urging also the invalidity of the alleged contract not only for lack of mutuality, but also because it related to an interest in lands, and because not to be performed within a year from its making, and so void under the statute of frauds (G. C. Ohio, §§ 8620 and 8621); also, because, considered as a sale, or a contract of sale, of goods of the value of $2,500 and upwards, void under the Ohio Sales Act (G. C. § 8384). Defendant also denies here the authority of its president to make the alleged contract. At the close of the testimony the presiding judge (the present Mr. Justice Clarke) directed verdict for defendant. This writ is to review the judgment entered thereon.

[1] We must assume, on this review, that plaintiffs' testimony is true, and that they are thus entitled to the benefit of every fair inference therefrom. Shadoan v. C., N. O. & T. P. Ry. Co. (C. C. A. 6) 220 Fed.

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68, 71, 135 C. C. A. 636. We accept their interpretation that the plant was to be operated by them.

[2, 3] The specific ground on which verdict was directed seems to have been lack of proof that plaintiffs were damaged by the breach of the alleged contract. We think the direction sustainable on this ground. There is no claim of damages (except as involved in loss of profits), or of money expended on faith of the contract. The sole basis of plaintiffs' claimed right of recovery is loss of profits, by being denied the right to perform. While plaintiffs showed the value of the crushed slag, there was no evidence of the cost of crushing and marketing it, and it seems to be assumed that a considerable portion at least required such treatment to make it marketable. The proof of profits lost was speculative and conjectural. Plaintiffs' testimony, based on inquiries at Detroit, that there was a given profit per ton at that place in the handling and marketing of slag, was properly excluded; for not only was it secondhand information, but there was no showing that the profits derivable from treating and marketing the dumps in question bore sufficient relation to the profits said to be derivable from the uses to which the slag was put in Detroit. Unless, therefore, there was other evidence taking it out of the general rule, the failure to show cost of operation was fatal to recovery. Anvil Mining Co. v. Humble, 153 U. S. 540, 549, 14 Sup. Ct. 876, 38 L. Ed. 814; McCornick v. Mining Co. (C. C. A. 8) 185 Fed. 748, 751, 108 C. C. A. 86; Magnolia Co. v. Gale, 189 Mass. 124, 132–133, 75 N. E. 219; Bristol R. Co. v. Bullock, 101 Va. 652, 44 S. E. 892; Klingman v. Racine Co., 149 Iowa, 634, 128 N. W. 1109; Bartow v. Erie R. R. Co., 73 N. J. Law, 12, 62 Atl. 489.

[4] One of the plaintiffs, however, upon cross-examination apparently designed to bring the case within the Ohio Uniform Sales Act, testified that "the value of that slag that we were to take away and in those piles would exceed the sum of $2,500"; and plaintiffs urge that this testimony is enough to support a verdict for at least $2,500 damages. We are unable to accept this view. It by no means follows that, because the slag was worth $2,500, plaintiffs were damaged in that amount by not getting it; for the contract was an entirety, and plaintiffs could not take away the slag, except by complying with the obligations imposed upon them, namely, the keeping of the slag out of defendant's way, not only during the demand for uncrushed slag, but during the entire year. In other words, plaintiffs had a duty to perform by way of payment for the slag; and the cost of performing that duty and making such payment does not appear.

[5, 6] Nor is the situation changed by the fact that defendant, during its subsequent operation, quoted "rough bank slag, uncrushed and unscreened," at the price of 30 cents per net ton delivered f. o. b. cars to either of three specified railroads; for the cost of such delivery does not appear, nor that there was a market at that price for untreated slag in the full amount which plaintiffs were required to take away. The failure to show the cost of plaintiffs' proposed operation, and the alleged loss of profits, is emphasized, and the correctness of the direction of verdict made especially apparent, by the indefinite and uncertain terms of the alleged contract, which render its validity extremely

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doubtful, to say the least. It does not appear that the parties reached agreement on all essential features involved. For example: No provision was made for transporting the slag from the dumps to the proposed crusher and thence to the cars; defendant (for the purpose of its own operation) later put in a railroad track for the purpose first mentioned; and the petition alleges that defendant was to furnish plaintiffs, not only with the crushing plant and steam shovel, but also "locomotive and use of defendant's railroad." But, if such latter provision were to be assumed, it still remains that the method and terms on which defendant should furnish power, railroad and shipping facilities, and the extent of plaintiffs' specific rights in and control over defendant's land and equipment, do not appear to have been considered. Even were we to assume that plaintiffs were entitled to recover nominal damages, the judgment should not be reversed for failure to allow such recovery, in the absence of specific assignment or complaint on that ground. Lawrence v. Porter (C. C. A. 6) 63 Fed. 62, 68, 11 C. C. A. 27, 26 L. R. A. 167.

[7-10] But, assuming that there was rational basis for ascertaining plaintiffs' alleged loss of profits, we think the direction of verdict was nevertheless proper. The slag dumps were either part of the real estate, or they were personalty. If part of the real estate, the agreement, not being in writing, was void under the statute of frauds (sections 8620 and 8621, O. G. C.), as a grant of or a contract for an interest in lands, tenements or hereditaments. If personalty, the contract was void under the Ohio Sales Act (section 8384, G. C.); for (as declared by section 8456) the term "goods" embraces "all chattels and personalty other than things in action or money" (Laundry Co. v. Whitmore, 92 Ohio St. 44, 52, 110 N. E. 518, Ann. Cas. 1917C, 988); the alleged contract was not one of manufacture by plaintiffs for defendant; the latter was not concerned with the crushing of the slag, except as means for getting it out of its way. Its agreement was essentially for the passing of title in payment for services, and the fact that payment was to be made in services, rather than in money, does not take the case out of the statute. Franklin v. Matoa Gold Mining Co. (C. C. A. 8) 158 Fed. 941, 943, 86 C. C. A. 145, 16 L. R. A. (N. S.) 381, 14 Ann. Cas. 302. The "dumps" were of the conceded value of $2,500. There was no note or memorandum in writing, and no earnest money or part payment; and, assuming that the identification of the goods amounted to their acceptance, under subsection 3 of section 8384 (Williston on Sales, § 76, p. 86), plaintiff did not "actually receive" them, and, under subsection 1, acceptance without actual receipt was futile. An essential part of the entire contract being void, and plaintiffs having rendered no services under it, no recovery can be had for its breach. Snow Storm Mining Co. v. Johnson (C. C. A. 9) 186 Fed. 745, 754, 108 C. C. A. 615; Smith on Fraud, § 355.

These conclusions make it unnecessary to consider the other defenses urged, or the remaining assignments of error presented.

The judgment of the District Court is affirmed.

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(244 Fed. 936)

HARPER TRANSP. CO. v. JOHNSON & HIGGINS.

(Circuit Court of Appeals, First Circuit. September 25, 1917.)

No. 1268.

1. FRAUDS, STATUTE OF ⚷44(1)—CONTRACTS—PERFORMANCE WITHIN A YEAR.
Plaintiff, a corporation engaged in the business of marine insurance brokerage, in 1911, placed the insurance on defendant's vessels covering their voyage from the Great Lakes to the seacoast, and also covering their operation on the coast. Plaintiff was personally liable for the premium on only some of the policies; defendant being directly liable to the insurers for other premiums. In November, 1911, premiums for that year not having been paid, plaintiff and defendant, after various negotiations, agreed that plaintiff should have defendant's marine insurance business for the next two years, subject to defendant's approval of the rates at which the insurance should be written, and that plaintiff should forbear immediate suit for premiums paid by it, and should pay the underwriters, on defendant's account, the balance of the 1911 premiums. The agreement also provided that defendant should have an extension of credit until July, 1912, or thereabouts; payments being made at such times and in such amounts as defendants reasonably could, the whole indebtedness to be discharged by July, 1912. *Held* that, as the number of defendant's vessels might vary from time to time, and as plaintiff was to have the business of insuring such vessels subject to approval of rates, the contract was not one to be performed within a year.

2. FRAUDS, STATUTE OF ⚷113—MEMORANDA—SUFFICIENCY.
Where the only memoranda of the terms of the contract were contained in letters, which did not set forth the terms of the contract as to the extension of credit and did not provide for payment by the plaintiff of the premiums on policies, where defendant was directly liable, the memoranda were not sufficient to take the case out of the New York statute of frauds, declaring that every agreement, promise, or undertaking not to be performed in one year from the making thereof is void, unless it or some note or memorandum be in writing and subscribed by the party to be charged, or by his agent.

In Error to the District Court of the United States for the District of Massachusetts; James M. Morton, Jr., Judge.

Action by Johnson & Higgins against the Harper Transportation Company. There was a judgment (228 Fed. 730) for plaintiff, and defendant brings error. Reversed, with directions.

Robert E. Goodwin, of Boston, Mass. (Floyd G. Blair, George K. Gardner, and Goodwin, Procter & Ballantine, all of Boston, Mass., on the brief), for plaintiff in error.

John G. Palfrey, of Boston, Mass. (Pierpont L. Stackpole and Warner, Stackpole & Bradlee, all of Boston, Mass., on the brief), for defendant in error.

Before DODGE and BINGHAM, Circuit Judges, and ALDRICH, District Judge.

BINGHAM, Circuit Judge. This is a writ of error from a judgment of the United States District Court of Massachusetts, entered in

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favor of Johnson & Higgins in an action brought by them against the Harper Transportation Company for breach of contract. The plaintiffs are a New Jersey corporation doing business in New York as marine insurance brokers. The defendants are a Maine corporation, with offices in New York and Boston, and operate a fleet of steamers and barges in the coastwise trade. They are lessees, not owners, of the vessels; the legal title to the same being held by the Philadelphia Trust, Safe Deposit & Insurance Company. Their fleet was built on the Great Lakes, and completed during the summer and fall of 1911; it consisted originally of four steamships and seven barges. In 1911 the plaintiffs placed the insurance on the defendants' vessels covering their voyages from the Great Lakes to the seacoast, and also covering their operation on the coast. The policies covering the voyages were known as voyage or trip policies, and those covering their operations on the coast as annual policies. The trip policies expired on the completion of the voyages, and the annual policies at various dates, beginning August 21, 1912, and ending some time in November, 1912. Some of the 1911 insurance was placed abroad, and the plaintiffs were liable for the premiums on such policies, and were also liable for the premiums on the policies which they had procured to be written by the Atlantic Mutual Insurance Company of New York. As to the premiums on the balance of the policies, the defendants were directly responsible to the underwriters. The plaintiffs received their compensation for placing the insurance from the underwriters; it being a certain percentage of the premiums.

In November, 1911, the premiums on the 1911 policies had not been paid, and the plaintiffs were pressing for payment and threatening suit. After various interviews and much correspondence had taken place, about an extension of credit as to premiums overdue and the placing of the insurance for the years 1912 and 1913, it was found by the court below that the parties, within a few days after January 12, 1912, entered into a contract whereby it was agreed that the plaintiffs should have the defendants' marine insurance business for the next two years, subject to the latter's approval of the rates for which the insurance should be written; that the plaintiffs should forbear immediate suit and pressure, should pay the underwriters on the defendants' account the balance of the 1911 premiums, and should grant the defendants an extension of credit to July 1, 1912, or thereabouts; that the defendants should make payments on their 1911 premium account at such times and in such amounts as they reasonably could from the receipts of their business; and that the account should be paid in full by July 1, 1912, or thereabouts. It was also found and ruled that the contract for placing the insurance for the years 1912 and 1913 was an entire contract; that the defendants, by placing the insurance for 1912 with another broker and refusing to permit the plaintiffs to place it, were guilty of a breach of contract going to the essence; that the plaintiffs were not in default; that the contract was not by its terms to be performed within one year, and was within the statute of frauds, but that it was sufficiently evidenced by writings to take it out of the statute.

Various errors are assigned, but we do not deem it necessary to

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consider them all, if the contract was not to be performed within a year, and the writings did not sufficiently evidence the contract which the court found the parties entered into.

[1] It does not seem to us that the court erred in ruling that the contract was not one to be performed within a year. By its terms the plaintiffs acquired the right to place the insurance on the fleet through the years 1912 and 1913, provided it procured a rate agreeable to the defendants; and the defendants bound themselves to accept the plaintiffs' services on those terms. The contract did not relate simply to renewals of the 1911 and of the 1912 insurance as the fleet was constituted at the time of making the contract, but obligated them to procure insurance on the defendants' fleet, whether it was made larger or smaller, at any time within the two years. Until that period had expired, it could not be determined whether the plaintiffs would or would not have to render further service under the contract; for the defendants might increase or reduce the number of their vessels, or might desire to increase their insurance, or otherwise change any of their outstanding policies, during the specified period. If it would have been possible for the plaintiffs to have placed the renewals of the 1912 insurance within a year from the making of the contract, it would not have been possible for them to have rendered all the service within that period which they contracted to perform.

[2] No question is raised but that the contract is governed by the law of the state of New York, and that, under the statute of frauds of that state:

"Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking: (1) By its terms is not to be performed within one year from the making thereof." Laws N. Y. 1897, vol. 1, p. 510.

And, as we are of the opinion that the contract, by its terms, is not one to be performed within one year from the making thereof, the question remains whether it was evidenced by some note or memorandum in writing sufficient to take it out of the statute.

In Poel v. Brunswick-Balke-Collender Co., 216 N. Y. 310, 110 N. E. 619, the Court of Appeals for that state, in the year 1915, in considering a similar question involving the interpretation of its statute of frauds, said:

"In order to satisfy the requirements of the statute of frauds, the written note or memorandum must include all the terms of the completed contract which the parties made. It is not sufficient that the note or memorandum may express the terms of a contract. It is essential that it should completely evidence the contract which the parties made. If, instead of proving the existence of that contract, it establishes that there was in fact no contract, or evidences a contract in terms and conditions different from that which the parties entered into, it fails to comply with the statute."

It is therefore necessary, in considering this question, to keep in mind the terms of the contract which the court found the parties actually made, in order to ascertain whether the writings upon which

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the plaintiffs rely, either expressly or by implication, embody all of its terms so as to take it out of the statute.

There is no question but that, both by the terms of the contract as found by the court and the proposals as evidenced by the writings, it was understood and agreed that the plaintiffs should have the defendants' marine insurance business for the years 1912 and 1913, subject to the latter's approval of the rate. It also seems to us that it is reasonably certain, both from the contract as found and the writings, that the plaintiffs were to forbear immediate suit and grant an extension of credit; but in the contract the terms upon which the credit was to be given, both as to the times of payment and amounts, differed materially from those stipulated in the writings. According to the contract, the defendants were to have an extension of credit until July 1, 1912, or thereabouts, and in the meantime were to make payments on their 1911 premium accounts, at such times and in such amounts as they reasonably could from the receipts of their business; but no writing was put in evidence which reasonably can be construed as embodying such an agreement. The letter of November 18, 1911, upon which the plaintiffs chiefly rely, is the only writing in which terms for an extension of credit are specified. But this writing does not aid the plaintiffs, for the terms of credit there proposed are widely different from those found to have been finally agreed to by the parties. The terms of payment were vital elements of the contract, and, unless evidenced by writing, render the contract void under the New York statute.

It further appears that, under the contract as found by the court, the plaintiffs were to pay the underwriters the 1911 premiums on the domestic policies upon which the defendants were directly responsible to the underwriters. This obligation was not expressly provided for in any of the writings put in evidence, and it may be doubtful whether it was involved by necessary implication in any of the propositions which the writings contained. Moreover, the writings that passed between the parties embodied terms that were in no way contained in the contract as found by the court, and the letters of January 17, 1912, and January 18, 1912, disclose that the parties' minds had not met upon the terms proposed in the writings; that the conditions upon which payment was to be made of the balance due the plaintiffs had not then been agreed upon.

The judgment of the District Court is vacated, the verdict is set aside, the case is remanded to that court for further proceedings not inconsistent with this opinion, and the plaintiffs in error recover their costs in this court.

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(244 Fed. 940)

CHIN AH YOKE v. WHITE, Immigration Com'r.

Ex parte CHIN AH YOKE.

(Circuit Court of Appeals, Ninth Circuit. August 20, 1917. Rehearing Denied October 8, 1917.)

No. 2859.

1. ALIENS ⟹32(8)—PROCEEDINGS FOR DEPORTATION OF CHINESE—SUFFICIENCY OF EVIDENCE.

Evidence *held* to sustain a finding by immigration officers that a Chinese woman, arrested for being unlawfully in the United States, was an alien, and not, as claimed, a native citizen.

2. ALIENS ⟹32(5)—PROCEEDINGS FOR DEPORTATION OF CHINESE—JURISDICTION—BURDEN OF PROOF.

The fact that a Chinese woman is arrested as an alien practicing prostitution in this country, in violation of the immigration laws, is sufficient to give the immigration officials jurisdiction to hear and determine the case, and on the hearing the burden of proof is on the defendant on all issues, including a claim to American citizenship.

3. ALIENS ⟹32(9)—PROCEEDINGS FOR DEPORTATION OF CHINESE—FAIRNESS OF HEARING.

That a witness, examined in deportation proceedings against a Chinese person, had left the state for his home, and could not be recalled by the commissioner for cross-examination, when requested by defendant, did not invalidate the proceedings, where the commissioner offered to hear the witness, if produced by defendant.

Appeal from the District Court of the United States for the First Division of the Northern District of California; Maurice T. Dooling, Judge.

Habeas corpus by Chin Ah Yoke, alias Jane Doe, against Edward White, Commissioner of Immigration for the port of San Francisco. From an order dismissing the petition, petitioner appeals. Affirmed.

Geo. A. McGowan, of San Francisco, Cal., for appellant.

John W. Preston, U. S. Atty., and Casper A. Ornbaun, Asst. U. S. Atty., both of San Francisco, Cal., for appellee.

Before GILBERT and HUNT, Circuit Judges, and WOLVERTON, District Judge.

GILBERT, Circuit Judge. The appellant appeals from the order of the court below sustaining a demurrer to a petition for a writ of habeas corpus. She had been arrested on the charge that she was an alien who had been practicing prostitution since her entry into the United States, and had been ordered deported. On the application for the writ the proceedings before the immigration officials were taken as part of the petition. It appeared therefrom that the appellant was

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taken into custody on September 1, 1915; that she was examined on September 7, and again on September 20, 1915, at which examinations she refused to answer questions as to her identity, but asserted that she was born in the United States and was a citizen thereof, and that her father was looking after her case. On December 20, 1915, there were filed on her behalf her own and four other affidavits: The affidavit of Chin Duck Quong, who deposed that he was the appellant's father, and that she was born March 23, 1896, at a given number on Commercial street, San Francisco, that Lee Shee was her mother, that Lee Shee died on or about June 20, 1900, and that the appellant had never been out of the United States; the affidavit of Ho Shee, who stated in detail her knowledge of the fact that the appellant was born in San Francisco, that the affiant resided in the same building, and that she knew the appellant until the death of Lee Shee, the appellant's mother, and that the appellant was then placed in the custody of affiant, who cared for and raised her under the supervision of Chin Duck Quong, appellant's father; the affidavit of Chin Shee, who testified that he knew the appellant and her parents, that the appellant continued to reside with her parents until her mother's death, and thereafter was placed in the custody and care of Ho Shee, who lived in the same building; the affidavit of Chin Pak, who deposed that he had known the appellant since she was 2 or 3 years of age, that she was then living with her parents, Chin Duck Quong and his wife, Lee Shee, in San Francisco, and that he had seen the appellant at frequent intervals from that time to the present. None of these Chinese persons who so deposed was called or examined before the immigration officials.

[1] There can be no doubt that there was evidence sufficient to justify the conclusion that the appellant was practicing prostitution at the time when she was taken in custody. The question whether she was an American citizen was decided adversely to her upon the following evidence: Robinson, one of the commissioners, certified on January 5, 1916, that he had "received information from a Chinese source" that the woman under arrest came to the United States a few years ago as the wife of a "Lim" man; and another inspector, in his memorandum for the commissioner, stated that information had been conveyed to him from several sources after her arrest that the appellant was a prostitute, and that she came to this country as the wife of a "Lim" man, who had since departed for China. Upon the information thus received from anonymous sources, the immigration records were searched, and a photograph was found upon which the immigration officials reached the conclusion that the appellant was Wong Ah Muy, who came to the United States on October 7, 1912, and that she was therefore a Chinese alien. The photographs of Chin Ah Yoke and Wong Ah Muy were presented to the court below on the petition for the writ, and to this court on the appeal. We think that they afford substantial evidence to sustain the conclusion of the immigration officials. Not only is there a general resemblance between the photo-

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graphs, with such difference as might be produced by three years of fast living, but the peculiar significance of the photographs is in the fact that in each there are two pits or pock marks, plainly visible, found in the identical position on each face.

[2] The appellant cites Moy Suey v. United States, 147 Fed. 697, 78 C. C. A. 85, and Gee Cue Beng v. United States, 184 Fed. 383, 106 C. C. A. 493, to the proposition that under her claim of citizenship she cannot be deported without an adjudication in a court, and that the burden is upon the government to prove that her claim of citizenship is unfounded. The doctrine of the cases so cited has not been accepted by other courts. In neither of the cases did the court take note of Chin Bak Kan v. United States, 186 U. S. 193, 22 Sup. Ct. 891, 46 L. Ed. 1121, in which the court said:

> "By the law the Chinese person must be adjudged unlawfully within the United States unless he 'shall establish by affirmative proof, to the satisfaction of such justice, judge or commissioner, his lawful right to remain in the United States.'"

See, also, Chin Yow v. United States, 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369, and United States v. Wong You, 223 U. S. 67, 32 Sup. Ct. 195, 56 L. Ed. 354.

In United States v. Too Toy (D. C.) 185 Fed. 838, Judge Hand refused to follow the rule of Moy Suey v. United States, holding that in United States v. Ju Toy, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040, it had been decided that the United States has the power to determine through the Executive Department the very issue of fact upon which its power of exclusion depends, and that it is not enough to give jurisdiction to a court that that issue involves citizenship. In Yee Ging v. United States (D. C.) 190 Fed. 270, Judge Maxey refused to follow Gee Cue Beng v. United States, notwithstanding that it was a decision of the Circuit Court of Appeals of his circuit, and held that the burden of proof was upon the Chinese person to prove, as he claimed, that he was a natural-born citizen. The fact that the appellant here is charged with being a Chinese prostitute in the United States in violation of the Immigration Act of 1907 (Act Feb. 20, 1907, c. 1134, 34 Stat. 898) is sufficient to show the jurisdiction of the immigration officials. United States v. Wong You, 223 U. S. 67, 32 Sup. Ct. 195, 56 L. Ed. 354. And we hold that the burden of proof is not shifted upon the United States by the fact that the appellant claims to be a citizen of the United States. Lee Yuen Sue v. United States, 146 Fed. 670, 77 C. C. A. 96; Yee King v. United States, 179 Fed. 368, 102 C. C. A. 646.

[3] The appellant contends that the hearing was unfair in that her counsel was afforded no opportunity to cross-examine Wong Him Sing, who had given testimony on September 1 and 2, 1915, tending to show that the appellant was a prostitute. Wong Him Sing was an American citizen, and after his examination he returned to his home at Yuma, Ariz. It was explained to appellant's counsel that owing to that fact, Wong Him Sing could not be produced for cross-examina-

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tion; but the immigration officials offered to hear the cross-examination of the witness, if the appellant had means by which to accomplish the opportunity. That was all that they were required to do, or could do. Low Wah Suey v. Backus, 225 U. S. 460, 32 Sup. Ct. 734, 56 L. Ed. 1165.

The judgment is affirmed.

(244 Fed. 943)

INDIANA HARBOR BELT RY. CO. v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. July 24, 1917.)

No. 2457.

1. MASTER AND SERVANT ⟹13—EMPLOYÉS—HOURS OF SERVICE ACT.

Under Hours of Service Act March 4, 1907, c. 2939, § 3, 36 Stat. 1416 (Comp. St. 1916, § 8679), declaring that the provisions for penalty for keeping employés on duty for longer than allowed shall not apply in case of casualty or unavoidable accident, or where the delay was the result of a cause not known to the carrier, or its officer or agent in charge of such employé at the time the employé left the terminal, and which could not have been foreseen, a railroad company cannot excuse the keeping of train employés on duty for longer than 16 hours, though the derailment of a car in a train ahead caused a delay which resulted in keeping the employés on duty for longer than the period allowed; it not appearing that after the derailment the company exercised a high degree of diligence to avoid the effect thereof.

2. MASTER AND SERVANT ⟹17—OPERATION—HOURS OF SERVICE ACT.

In an action for violating the Hours of Service Act by keeping train employés on duty for more than 16 hours, evidence *held* insufficient to show that the company's agents exercised a high degree of care to prevent employés from being on duty longer than the period allowed.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Action by the United States against the Indiana Harbor Belt Railway Company for violation of the Hours of Service Act. There was a judgment for the United States, and defendant brings error. Affirmed.

F. Harold Schmitt, of Chicago, Ill., for plaintiff in error.

Charles F. Clyne and Frederick Dickinson, both of Chicago, Ill., and Philip J. Doherty, of Washington, D. C., for the United States.

Before KOHLSAAT and EVANS, Circuit Judges.

PER CURIAM. [1] The railroad crew, consisting of five men in charge of a freight train running from Blue Island to Chicago and return, a distance of 63 miles, and which train was engaged in interstate commerce, was in continuous service for a period varying from 17 hours 5 minutes to 17 hours 35 minutes. In justification for such hours of service the plaintiff in error showed that, by reason of a derailment of a car in a train ahead, there was a delay of 2 hours and 20 minutes.

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The first contention of the plaintiff in error is that delay being of such origin comes within the exception of section 3 of the act, and the maximum period of 16 hours was thereby automatically extended 2 hours and 20 minutes. This position must be rejected upon the authority of San Pedro, Los Angeles & Salt Lake R. R. Co. v. United States, 220 Fed. 737, 136 C. C. A. 343; Atchison, Topeka & Santa Fé R. R. Co. v. United States, 220 Fed. 748, 136 C. C. A. 354; United States v. Atchison, Topeka & Santa Fé R. R. Co. (D. C.) 236 Fed. 154; Northern Pacific R. R. Co. v. United States, 213 Fed. 577, 136 C. C. A. 157; United States v. Southern Pacific Co., 220 Fed. 748, 136 C. C. A. 351; Chicago & Northwestern R. R. v. United States, 234 Fed. 268, 148 C. C. A. 170; Baltimore & Ohio R. R. Co. v. United States, 243 Fed. 153, 156 C. C. A. 19 (decision of Circuit Court of Appeals, Sixth Circuit, decided May 8, 1917).

The defense of the carrier in a case like the present one is not complete by showing a delay which was "the result of a cause not known to the carrier or its officers or agents in charge of such employés at the time said employés left a terminal and which could not have been foreseen." The carrier was required to show, in addition thereto, that it exercised a high degree of diligence to overcome the effect of the delay and relieve its employés from continuous service over 16 hours. See cases cited above.

[2] The second contention of the plaintiff in error is that the evidence showed affirmatively a high degree of diligence displayed on its part to prevent continuous service beyond 16 hours. The case was tried by the court without a jury upon stipulation of the parties. The record fails to show any effort on the part of the carrier to relieve its servants from employment upon the expiration of the maximum time limit during which they might be continuously in service. In fact, it was admitted on the trial that no effort was made by the train dispatcher or any other representative of the carrier to relieve the crew after it learned of the accident and resulting delay. The train dispatcher labored under the impression that the 16-hour limit was extended for a period of 2 hours and 20 minutes, due to excusable delay, and that no violation of the law would occur until the crew had been in continuous service for 18 hours and 20 minutes, and such misapprehension of the law explains, at least in part, the failure of the carrier to take any steps to relieve the crew. We conclude the evidence supports the finding of the learned trial judge.

This being the situation disclosed by the record, there is no need of considering the government's contention that the evidence utterly fails to disclose any such a delay as is defined in the exception appearing in section 3 of the act.

Judgment is affirmed.

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(244 Fed. 945)

CHICAGO & A. R. CO. v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. July 12, 1917.)

No. 2447.

MASTER AND SERVANT ⟹13—HOURS OF SERVICE—SWITCH TENDERS—TELEPHONE ORDERS.

Switch tenders, who regularly conduct the movements of the trains in and through a yard, receiving the yardmaster's telephone orders in their shanties, and executing them by transmitting them verbally or by signal to the engine or train crews, and by manipulating switches, are within the proviso of Hours of Service Act March 4, 1907, c. 2939, § 2, 34 Stat. 1416 (Comp. St. 1916, § 8678), limiting to nine hours the service of an employé who by use of the telephone receives orders pertaining to or affecting train movements.

In Error to the District Court of the United States for the Southern Division of the Southern District of Illinois.

Action by the United States against the Chicago & Alton Railroad Company. Judgment for the United States, and defendant brings error. Affirmed.

William L. Patton, of Springfield, Ill., for plaintiff in error.

Philip J. Doherty, of Washington, D. C., for the United States.

Before KOHLSAAT, ALSCHULER, and EVANS, Circuit Judges.

PER CURIAM. The action was for violation of the Hours of Service Act of March 4, 1907. The facts were stipulated, and the question here is whether the 16-hour limit applies, or the 9-hour limit of the proviso, which is applicable to "operator, train dispatcher, or other employé who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements." Section 2 (Comp. St. 1916, § 8678).

The employés involved are the so-called switch tenders in defendant's 7¾-mile long Bloomington-Normal yard, who conduct the movement in and through that yard of all of defendant's trains, passenger and freight, and who were working 12 consecutive hours without emergency necessitating service beyond 9 hours. The train dispatchers and operators who direct the movement of the trains elsewhere on the road outside of the yard limit have no function within it. Therein the yardmaster has the general direction of all train movements; his orders being communicated to and executed by his subordinates, the switch tenders, who are stationed at various switch shanties within the yard, each switch tender having special charge of certain switches in the immediate vicinity of his particular shanty, and the service being continuous night and day. The orders for the movement of the trains are transmitted by the yardmaster from his central office by tele-

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phone to the various switch shanties, where the switch tenders, at phones therein, receive them, and execute them by transmitting them verbally or by signal to the engine or train crews, and by manipulating the switches, so that trains may take their proper tracks without coming in contact with each other or with the various switch engines and cars being switched and moved thereabout. Defendant had a rule requiring trains passing through the yard to reduce speed and proceed only after the way is seen or known to be clear. This use of the telephones by the switch tenders in connection with the movement of the trains was not occasional or exceptional, but was part of their general and usual duties; each train movement so communicated to the crews, or participated in by the switch tender, being preceded by his reception of a telephoned order directing it.

Our decision of August 6, 1915, in Chicago, Rock Island & Pacific Ry. Co. v. United States, reported in 226 Fed. 27, 141 C. C. A. 135, and followed by us in Chicago & Northwestern Ry. Co. v. United States, 226 Fed. 30, 141 C. C. A. 138, is against the proposition, advanced for plaintiff in error, that the 16-hour limit, and not the 9-hour limit, applies; and upon the authority of those cases the judgment of the District Court must be and is affirmed.

(244 Fed. 946)

FOSTER v. T. L. SMITH CO. et al.

(Circuit Court of Appeals, Seventh Circuit. February 1, 1917. Rehearing Denied July 26, 1917.)

No. 2360.

1. PATENTS ⚷328—VALIDITY AND INFRINGEMENT—CONCRETE MIXER.
   The Smith patent, No. 803,721, for a concrete mixing machine, while for a combination of old elements, covers a new and useful combination, not anticipated, and discloses invention; also *held* infringed as to a number of claims, but claim 5 *held* invalid, as a duplication of another claim.

2. PATENTS ⚷27(1)—INVENTION—ADAPTATION TO ANOTHER ART.
   It is usually true that the observation and the imagination of the inventor are required to make adaptations from one art to another.

3. PATENTS ⚷234—INFRINGEMENT—FORMAL CHANGES.
   Infringement is not avoided by changes in the mechanism of the patented device, so as not to literally conform to the language of the claims, if the defendant has appropriated the real substance of the invention.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit in equity by the T. L. Smith Company, the Jaeger Machine Company, and the Waterloo Cement Machinery Corporation against

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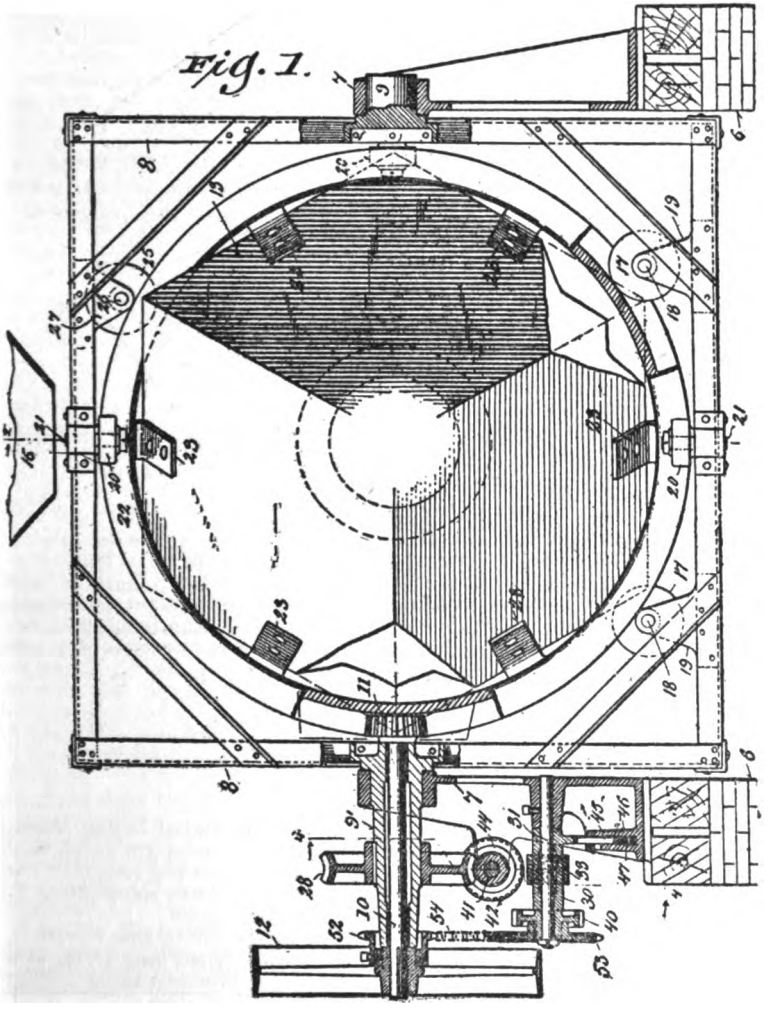
Edward Foster. Decree for complainants, and defendant appeals. Affirmed in part.

By the decree of the District Court appellant is enjoined from continuing the infringement of claims 5, 16, 17, 18, 28, 30, 31, and 32 of patent No. 803,721, issued on November 7, 1905, to appellee the T. L. Smith Company, as assignee of the applicant, Thomas L. Smith, for a machine to mix concrete. The other appellees are joint, exclusive licensees of the Smith Company. Appellant is the owner and user of a single machine, which was manufactured and sold to him by the Cement Tile Machinery Corporation of Waterloo, Iowa, which is defending this suit.

Figures 1 and 3 of the drawings are as follows:



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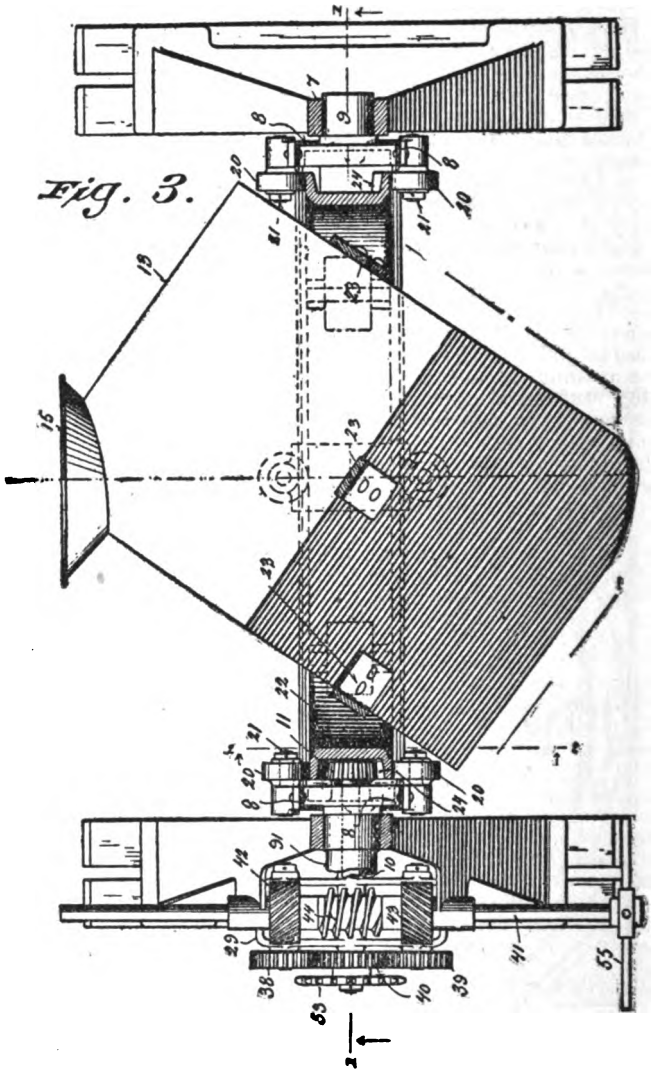

Smith's specific description of the form which is stated in the patent to be the preferred form discloses a polyhedric mixing receptacle and a tiltable supporting frame which is in a plane at right angles to the receptacle's axis of revolution. To the specific details of this preferred form many claims were addressed, of which claim 24 may be taken as illustrative:

"In a mixing machine, the combination of a polyhedric mixing receptacle, a tiltable frame supporting said receptacle, means for tilting said frame to any position in the entire circle of its revolution, a gear attached to the periphery of said receptacle, said gear having supporting surfaces and guiding surfaces whereby said receptacle is completely centered and guided, and means for applying the power to said gear in any position of said receptacle and tiltable frame."

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But the specification pointed out that the form of the mixing receptacle was not of the essence of the general inventive concept, and stated that a receptacle of any desired shape might be employed. Likewise, with respect to the preferred form of frame which entirely surrounds the revolving receptacle and supports it by means of rolls *17* fitting into the U-shaped annulus *22*, the specification stated that the invention in its general aspect might be enjoyed by the use of a tiltable frame of "any desired form adapted for supporting the mixing receptacle."

None of the claims counted on in this suit is limited to the specific form of receptacle or tiltable frame or of the annulus on the receptacle.

Claim 5: "In a mixing machine, the combination of a receptacle provided with means for charging and discharging the same, a ring or annulus around the receptacle and provided with teeth forming an annular rack, a tiltable frame in which the receptacle is revolubly supported, said frame provided with projecting trunnions mounted rotatably in suitable bearings, one of said trunnions being tubular, a shaft extending through the tubular trunnion and provided on its inner end with a gear-wheel engaging the annular rack bar of the ring or annulus, and means for rotating said shaft."

Claim 16: "In a mixing machine, the combination of a mixing receptacle having one clear and unobstructed opening for feed and discharge, concentric, or substantially so, with the axis of revolution, a tiltable frame in which the receptacle is revolubly supported, means for tilting the frame to any position in the entire circle of its revolution, whereby the receptacle may be filled from any point above it and discharged either from the right-hand side, or the left-hand side of the machine."

Claim 17: "In a mixing machine, the combination of a mixing receptacle, means for imparting to said receptacle a continuous rotation, a tiltable frame revolubly suporting such receptacle, means for tilting said frame to any position in the entire circle of its revolution, and means for holding said frame in any position."

Claim 18: "In a mixing machine, the combination of a mixing receptacle, a tiltable frame revolubly supporting said mixing receptacle, means for tilting said frame to any position in the entire circle of its revolution, and means for continually revolving said receptacle while in any tilted position, or while moving from one position to another."

Claim 28: "In a mixing machine, the combination of a mixing receptacle having one clear and unobstructed opening for feed and discharge, concentric or substantially so, with the axis of revolution, a tiltable frame supporting said receptacle, means for tilting said frame either to the right or to the left of the loading point, a gear on said mixing receptacle, and means for applying power to said gear in any position of said frame and receptacle."

Claim 30: "In a mixing machine, the combination of a mixing receptacle having one clear and unobstructed opening for feed and discharge concentric or substantially so, with the axis of revolution, a tiltable frame supporting said receptacle, means for tilting said frame either to the right or to the left of the loading point, a gear disposed around the middle of said receptacle, and means for applying power to said gear in any position of said receptacle and tiltable frame."

Claim 31: "In a mixing machine, the combination of a mixing receptacle having one clear and unobstructed opening for feed and discharge concentric, or substantially so, with the axis of revolution, a tiltable frame supporting said receptacle, means for tilting said frame either to the right or to the left of the loading point, a gear on the largest diameter of said receptacle, and means for applying power to said gear in any position of said frame and receptacle."

Claim 32: "In a mixing machine, the combination of a mixing receptacle having one clear and unobstructed opening for feed and discharge concentric, or substantially so, with the axis of revolution, a tiltable frame supporting said receptacle, means for tilting said frame either to the right or to the left of the loading point, a circular toothed rack disposed around the middle of said receptacle, a bevel pinion engaging said toothed rack and journaled in

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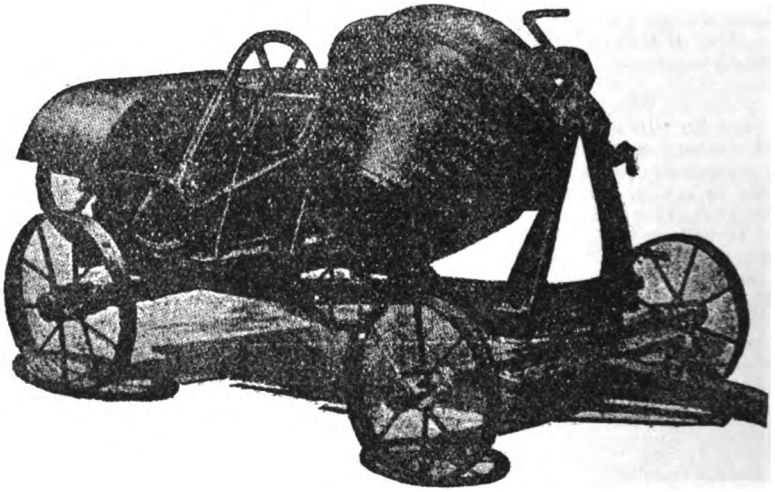
the tilting axis, and means for connecting said pinion with the source of power."

The commercial machines of the respective parties are substantially alike. We subjoin a cut of the Waterloo mixer:



George C. Kennedy, of Waterloo, Iowa, and John E. Stryker, of St. Paul, Minn., for appellant.

George L. Wilkinson, of Chicago, Ill., for appellees.

Before BAKER, MACK, and ALSCHULER, Circuit Judges.

BAKER, Circuit Judge (after stating the facts as above). [1] I. Utility is presumed; but if we first apprehend the nature and advantages of the machine which Smith conceived, we shall be in a better position to understand and apply the prior art.

Smith's most general conception of his machine as an entirety is probably best stated in claim 32. There, the only limitations upon the form of the mixing receptacle are that it shall have but one opening, which must be clear and unobstructed and substantially concentric with the axis of revolution, and that it shall have a recognizable "middle." The advantages of the one clear and unobstructed opening are that it may be used both for feed and discharge; that the feed may be one side where the materials are gathered and the discharge on the other side where the mixed concrete is being used; and that thereby a form of receptacle is provided wherein more than 50 per cent. of the cubic capacity can be occupied by the ingredients that are being mixed, as against 10 or 15 per cent. in the cylindrical or horizontal drum machines which have openings at each end, one for feeding and the other for discharging. The saving of size and weight, in relation to the capacity of the machine, smaller cost of manufacture, lower selling price, decreased expense of operation, are of advantage both to the maker and the user. By having a "middle" part, as in a pot or jar, the tilting means and likewise the rotating means are applied

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substantially in line with the center of gravity of the loaded receptacle and therefore both movements may be most readily effected; and also the driving pinion, journaled in the tilting axis, may thus engage the toothed rack on the periphery of the receptacle without the use of intermediary gears or other driving means.

In the practical art of building and using concrete mixing-machines these advantages, and the type of machine which made them possible, were unknown prior to Smith's disclosure.

II. Anticipation. We have examined all the prior patents in the record. Two are especially relied upon. If these do not anticipate Smith's conception and disclosure of means, it is needless to set forth the particulars of the other prior patents.

Day and Lampard's British patent, No. 441 of 1878, exhibits a concrete mixer of the horizontal drum type. The receptacle is supported at its right-hand end by a series of rollers which are attached to the tilting frame. The left-hand end is supported by a shaft which is journaled in the tilting frame. The tilting frame is rectangular and entirely surrounds the drum receptacle. By means of trunnions at the middle of the sides the tilting frame is supported within a stationary rectangular frame. Materials are fed into the right-hand end of the drum through a circular opening, concentric with the axis of the drum. Attached to the right-hand end of the tilting frame is a hopper that extends into the feed opening. The drum is rotated by means of a toothed rack which encircles the drum and engages with a driving pinion journaled in one of the trunnions. When the material is mixed it is discharged through an opening at the left-hand end of the drum. For this purpose the receptacle and its tilting frame may be depressed at the left until the end of the drum strikes the ground at an angle of about 45°. The second claim covers "the combined arrangement, substantially as hereinbefore described and illustrated in the drawing annexed, wherely the mixing box can be revolved and at the same time tilted to and fro to any desired angle." In the specification the reference to "tilting to and fro" is that "the mixing box as the mixing progresses may also be rocked or oscillated on the trunnions to insure the perfect mixing of the materials." When we look to the arrangement described and illustrated in the drawing, we find that the tilting to the right is very limited; it can proceed only to the point where the hopper which is permanently attached to the tilting frame strikes the right-hand end of the supporting frame. And even if the tilting axis were elevated so high that the left-hand end of the drum would not strike the ground the feed opening could not be carried below the horizontal position at the left on account of the hopper striking the fixed supporting frame at that end. Day and Lampard's combination does not include a mixing receptacle having one clear and unobstructed opening for feed and discharge, nor means for tilting the frame to any position in the entire circle of its revolution whereby the receptacle may be filled from any point above it and discharged either from the right-hand side or the left-hand side of the machine.

Taylor's patent, No. 433,663, August 5, 1890, is for a tumbling box to clean castings. The machine is supported upon a fixed frame.

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A tiltable yoke is supported by means of trunnions upon the fixed frame. Within the yoke is supported a receptacle of the pot or jar form. To the bottom of the receptacle is attached a beveled gear, which is engaged by a beveled pinion on a shaft which is housed in the tilting yoke and carries at its outer end a spurred gear which in turn engages another spurred gear mounted to rotate around the axis of one of the trunnions. The receptacle is thus rotated by means of two parallel shafts, two spurred gears, and two beveled gears. As the spurred gears are outside and the beveled gears inside of the stationary frame, the shaft which is housed in the tilting yoke limits the tilting so that the receptacle can be loaded and discharged only on one side of the stationary frame. This Taylor structure lacks the Smith purpose and means of tilting, and likewise the simple and direct rotating means, both of which are essential elements of the Smith combination.

[2] III. Invention. The prior art beyond question shows that each element of the Smith combination was old. Even if this were not true, and if Smith had in fact created a new element, he would not secure a monopoly of it by putting it into a combination claim. If he did not separately claim it, he would by putting it into a combination donate it to the public. So the fact that the elements were old is not material, for the combination is itself the entity with which we are now concerned. We have found that this entity is new. In the light of the prior art, was the use of the inventive faculty required in its production? The prior art must be examined with the view of determining the purposes and laws of operation of the prior structures. If the idea of the patent in suit so obtruded itself from the prior art that the ordinary mechanic could not help from stumbling upon it, then of course no invention was involved. While it may be easy enough now, after we have comprehended Smith's purpose and means, to read a part of Smith's total conception into the Day and Lampard patent, and another part into the Taylor patent, we are unable to find in either of them, when they are taken in the light of their purposes and laws of operation, the conception of Smith and his combination of means for embodying it. The Day and Lampard structure was of the horizontal drum type. Smith produced an essentially different type. Nothing of the sort had before appeared in the practical or even in the paper art of making and using concrete mixers. Granting, as we do, that tumblers for castings in foundries and puddling furnaces in steel mills are in analogous arts, and therefore must be taken into account, yet it is evident that the strongest of such references, the Taylor patent, would have to be reorganized and materially modified in order to adapt it to Smith's conception. And usually it may be taken as true that the observation and the imagination of the inventor are required to make adaptations from one art to another. Potts v. Creager, 155 U. S. 597, 15 Sup. Ct. 194, 39 L. Ed. 275; Wold v. Thayer, 148 Fed. 227, 78 C. C. A. 350. When one has conceived a new entity he may go where he pleases for his materials with which to give it a body. Here the act of the inventor consisted of picturing in the creative imagination the new result, the

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new machine for achieving it, and the way to build the machine, rather than of the selection and rearrangement of the elements which may be found singly or in partial groups in concrete mixers of the horizontal drum type or in the tumblers for casting in foundries or in the puddling furnaces in steel mills. Indiana Mfg. Co. v. J. I. Case Co., 154 Fed. 365, 83 C. C. A. 343; Railroad Supply Co. v. Hart Steel Co., 222 Fed. 261, 138 C. C. A. 23.

If the mechanics of the case left us in doubt, certain matters disclosed by the record should cause us to resolve that doubt in favor of the patentee. First. The usual presumption of validity is greatly fortified by the fact that all of the prior art patents which are now called to our attention were before the Patent Office when that tribunal was weighing the question of invention. Second. The great length of time that elapsed between the publication of the prior patents most strongly relied on and the application for the patent in suit. Those prior patents never made any impress upon the practical art of building and using concrete mixers, and are now brought to light only for purposes of defense. Third. Assuming for the moment that appellees' structure has not departed from their patent, a large and successful business has been built up; and machines of this type (made only by the parties involved in this cause) have taken, according to the evidence, a prominent place in the market for small portable concrete mixers.

IV. Infringement. There is no contention that appellees' commercial machine does not conform to the claims in suit in all respects except one; and that is in respect to "the tiltable frame in which the receptacle is supported." In the specific claims, which are addressed to the preferred form of structure, the tiltable frame is required to be in a plane to which the axis of the receptacle's revolution is perpendicular. In the claims in suit there is no limitation with respect to the relation of the plane of the frame and the line of the axis of revolution. And if the preferred form of tiltable frame were placed in a plane in which the line of the axis of revolution would lie, there would seem to be no basis whatever for saying that the structure would not be within the letter and spirit of the claims in suit. The real defense of noninfringement is that what is called a yoke in the commercial structure is not the tiltable frame of the claims in suit. The yoke has three sides. The portion of it at the bottom of the receptacle is longer than the diameter of the receptacle. From that portion uprights extend at each end up to the middle or largest diameter of the receptacle. It is evident that a pot-shaped receptacle, having about its middle a toothed gear to be driven directly by a pinion journaled in a supporting trunnion, could not be supported by a tilting structure having less than three sides. If the two parallel arms of the yoke were extended and a fourth side added, so as completely to embrace the receptacle, there could be no question that the frame was present. The function of the "frame" is solely to afford a tiltable support. In the yoke, or frame of three sides with one side omitted, there is plainly the essential supporting means of the claims in suit, for the receptacle is prevented from falling out of the open end of the three-sided frame

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by means of a bolt which extends from the center of the bottom of the receptacle through the long member of the yoke and upon the end of which is threaded a nut. This nut manifestly opposes the movement of the receptacle in the fourth direction just as clearly as would a fourth side to the frame.

It is to be remembered that the specification told the persons who proposed to use the invention as described in the claims in suit that they could employ a frame of any form adapted for supporting the receptacle. Not only are the two forms the same in furnishing the tiltable support for the revoluble receptacle, but at the time Smith was speaking in his application the prior art showed that both forms were old and that each was adapted to afford a tiltable support for a revoluble receptacle. This fact is exhibited in the examinations we have hereinbefore made of the Day and Lampard and Taylor patents. Therefore we find that appellees' commercial structure was within their patent.

[3] Appellant's structure very plainly has been taken from appellees' commercial structure. They are exactly the same in operation and result. Two small differences appear. One is that the circular toothed rack is placed slightly away from the exact "largest diameter" or "middle" of the receptacle. The other is that the mouth of the pot-shaped receptable is prolonged so that the receptacle cannot be revolved through the 360 degrees by reason of striking the bottom of the circle. But the circular toothed rack is so near the largest diameter of the receptacle that all of the advantages of the patent are secured in that respect. And with respect to tiltability, all of the advantages of loading on one side and discharging on the other are obtained as fully as in the patented structure. Further, while claim 16, for example, speaks of tiltability throughout "the entire circle," that expression is modified by the clause, "whereby the receptacle may be filled from any point above it and discharged either from the right-hand side or the left-hand side of the machine." Crane Co. v. Baker, 125 Fed. 1, 3, 60 C. C. A. 138. These changes impress us as having been intentionally devised for the purpose of creating a verbal differentiation. But infringement is not thereby escaped, if the defendant has actually appropriated the real substance of the invention. Adam v. Folger, 120 Fed. 260, 56 C. C. A. 540; United States Metallic Packing Co. v. Hewitt Co. (D. C.) 220 Fed. 171.

We conclude that all of the claims in suit are valid and infringed except claim 5. That claim calls for a receptacle provided with "means for charging and discharging the same." "Means" is at once the singular and plural form. If this claim contemplates a receptacle with two openings, the claim reads literally upon the Day and Lampard structure. It seems to us however that the word, in view of the purposes and law of operation of the patent device, should be taken as the singular form; but when so taken the claim becomes in essence identical with claim 32. Lamson Store Service Co. v. Hillman, 123 Fed. 416, 59 C. C. A. 510; Veneer Machinery Co. v. Grand Rapids Chair Co., 227 Fed. 419, 142 C. C. A. 115.

The decree, except as to claim 5, is affirmed.

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(245 Fed. 9)

VINEYARD LAND & STOCK CO. v. TWIN FALLS SALMON RIVER LAND & WATER CO. et al.

(Circuit Court of Appeals, Ninth Circuit. August 6, 1917.)

No. 2885.

1. WATERS AND WATER COURSES ⟹247(1)—PRIOR APPROPRIATIONS—EVIDENCE—WEIGHT.

That surveys and estimates of plaintiffs claiming under the Carey Act (Act Aug. 18, 1894, c. 301, § 4, 28 Stat. 422 [Comp. St. 1916, § 4685]) were made three years earlier than those of defendant renders plaintiffs' testimony as to the amount of water appropriated the more reliable, because speaking of a time much nearer the time of plaintiffs' appropriation.

2. WATERS AND WATER COURSES ⟹247(1)—PRIOR APPROPRIATION—EVIDENCE—SUFFICIENCY.

In a suit between appropriators of water from an interstate stream, under the Carey Act, evidence *held* to support the court's estimate that 5,500 acres comprised all the lands which defendant had under irrigation at the time of plaintiffs' appropriation.

3. WATERS AND WATER COURSES ⟹240—APPROPRIATION—MODE.

An appropriation of water from a public stream, under the Carey Act, may be initiated by notice or by actual diversion from the stream, either process being evidentiary of the intent on the part of the person giving the notice to make an appropriation.

4. WATERS AND WATER COURSES ⟹240—APPROPRIATION—EXTENT.

In the appropriation of water from a public stream by notice, the notice would indicate the amount of the intended appropriation, while in appropriation by diversion the capacity of the ditch used for the purpose would indicate the appropriator's thought as to the amount designed for use.

5. WATERS AND WATER COURSES ⟹249—APPROPRIATION—BENEFICIAL USE—DILIGENCE.

After initiating an appropriation, an appropriator must use due diligence in applying the water for a beneficial use or he will be deemed to have abandoned his rights as to appropriations by others in the meantime.

6. WATERS AND WATER COURSES ⟹249—APPROPRIATION—BENEFICIAL USE—"DILIGENCE."

Whether an appropriator of water from a public stream has used due diligence to utilize the water for a beneficial use must be determined upon the facts in the particular case, "diligence," as employed in such case, being largely a relative term.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Diligence.]

7. WATERS AND WATER COURSES ⟹249—APPROPRIATION—DILIGENCE—EVIDENCE—SUFFICIENCY.

The want of diligence of defendant and his predecessor in constructing the high-line ditch, and the application of the water through it to a beneficial use, *held*, under the evidence, to deprive defendant of its initiatory rights in so far as affecting plaintiffs' appropriations.

8. WATERS AND WATER COURSES ⟹249—APPROPRIATION—AMOUNT NECESSARY.

An appropriator can claim no more water than is necessary for the purpose of the appropriation, and when he has that he cannot prevent others from using the surplus.

9. WATERS AND WATER COURSES ⟹254—APPROPRIATION—AMOUNT NECESSARY—EVIDENCE—SUFFICIENCY.

In suit between appropriators of a public stream, *held*, under the evidence, that the court properly concluded that 12,500 acre-feet was sufficient to answer the needs of defendant under its appropriations.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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10. WATERS AND WATER COURSES ⟹254—APPROPRIATION—BENEFICIAL USE—AMOUNT.

In a suit to determine conflicting rights to the waters of a public stream, 3 acre-feet per acre for hay and grain land, and 1½ acre-feet for pasture land, *held* a reasonable allowance to defendant, whose land was only slightly above the water in the streams.

11. WATERS AND WATER COURSES ⟹247(1)—RIGHTS AS BETWEEN STATES—PARTIES.

The rights, as between states, to share in the waters of an interstate stream, is a matter for adjustment between the states, and individual users cannot raise a question about the use of such water in another state out of the territorial jurisdiction of the court.

12. WATERS AND WATER COURSES ⟹247(1)—PRIOR APPROPRIATIONS—NATURE OF SUIT.

A suit to determine rights to the waters of a public stream between parties claiming by prior appropriation is essentially one to quiet title to real property and is local and not transitory.

13. COURTS ⟹29—POWERS—PROPERTY OUTSIDE OF JURISDICTION.

The rem may not be affected by the direct operation of the decree where it is beyond the territorial jurisdiction of the court, but the court may, acting in personam, coerce action respecting such property.

14. WATERS AND WATER COURSES ⟹240—USE—RESTRICTIONS.

Ordinarily one having obtained the right to use a given quantity of water from a public stream may change the place or character of its use and the point of diversion.

15. WATERS AND WATER COURSES ⟹247(1)—REGULATION OF USE—TERRITORY BEYOND JURISDICTION OF COURT.

The United States District Court of Idaho had the power, in a proceeding in personam, to restrict defendant's use of the water to a circumscribed locality in Nevada, where a change in territory would result in less water flowing back into the stream, resulting in loss to plaintiffs.

16. WATERS AND WATER COURSES ⟹247(1)—REGULATION OF USE—TERRITORY BEYOND JURISDICTION OF COURT.

It was also proper to impose upon defendant the obligation of installing measuring devices and keep a record of the amount of water diverted, etc., and provide that plaintiffs should have the right of inspection.

17. WATERS AND WATER COURSES ⟹240—CAREY ACT—PERFECTING APPROPRIATION—TIME.

In a project, under the Carey Act of Congress, to impound all waters of the Salmon river, in Idaho, plaintiffs had 10 years within which to make diversion, and proof thereof, for a beneficial use, in view of Laws Idaho 1915, c. 94.

Appeal from the District Court of the United States for the Southern Division of the District of Idaho; Frank S. Dietrich, Judge.

Suit by the Twin Falls Salmon River Land & Water Company, a corporation, and another, against the Vineyard Land & Stock Company, a corporation. From the decree entered, defendant appeals. Affirmed.

Frank K. Nebeker, of Salt Lake City, Utah, C. A. Boyd, of Ogden, Utah, Edwin Snow, of Boise, Idaho, and C. B. Henderson, of Elko, Nev. (Howat, Marshall, Macmillan & Nebeker, of Salt Lake City, Utah, of counsel), for appellant.

Richards & Haga and J. L. Eberle, all of Boise, Idaho, for appellees.

Before GILBERT and HUNT, Circuit Judges, and WOLVERTON, District Judge.

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WOLVERTON, District Judge. This suit was instituted to determine the conflicting water rights alleged by the parties, respectively, to have been acquired by prior appropriation. The defendant, appellant here, is engaged in raising and husbanding stock upon the ranges, consisting in most part, but not entirely, of lands it has acquired and now owns. It is alleged that these appropriations of water are from Salmon river and its tributaries. The river extends for many miles in the state of Nevada, running in a general northerly direction, crosses the northern boundary line into the state of Idaho, and continues in that state down to where its waters are captured by plaintiffs, who are the appellees here. The plaintiffs are the owners of a project devised and constructed under the provisions of the Carey Act of Congress (Act Aug. 18, 1894, c. 301, § 4, 28 Stat. 422 [Comp. St. 1916, § 4685]), whereby is impounded all the water coming down Salmon river, by means of a dam of unusual dimensions, forming a reservoir in the stream. The dam being completed, water was first turned into it about May 1, 1911, and its use for irrigation began in June of that year. The appropriation was acquired under three permits issued by the state engineer of the state of Idaho. These permits are: (1) No. 2,659, for 1,500 cubic feet per second, with a priority as of December 29, 1906; (2) No. 3,267, for 500 cubic feet, with a priority as of August 22, 1907; and (3) No. 5,519, for 1,000 cubic feet, as of September 7, 1909. It was intended by the project to reclaim 150,000 acres of land, but, because of the limited water supply, the system was reduced to reclaim approximately 100,000 acres only. Water rights have been actually sold aggregating about 73,000 acres. The entire water flow, however, never reached the dimensions of the first permit, and, generally, but a small proportion thereof. That these appropriations were regularly made and acquired there is no dispute; the sole controversy being as to what appropriations the defendant has that are prior in time and superior in right to the plaintiffs' appropriations. The principal ranches for which appropriations are claimed by the defendant are the Hubbard ranch, lying mainly in township 43, range 63 east, a small portion only extending into township 44; the Vineyard ranch, in township 44, range 63; the San Jacinto ranch, extending from the center line of section 21, township 45, range 64, to about the south line of section 23, in township 47, range 64, being comprised by townships 45, 46, and 47, range 64 east; and the Bridge ranch, on the Shoshone creek, a tributary to Salmon river, in township 47, ranges 64 and 65. Other small appropriations are claimed from other tributaries to Salmon river, which will be mentioned specifically.

The trial court decreed that defendant is entitled to 12,500 acre-feet of water to satisfy the rights which may be said to be prior to those of the plaintiffs. This comprises all appropriations upon all the ranches designated, as well as those to be specifically mentioned. The decree specifically describes the lands to which the appropriations are appurtenant, and defendant's counsel claim that these aggregate approximately 11,660 acres, which a cursory estimate from the record confirms, but say there are in fact something over 3,000 acres of unirrigated lands described in the decree. The trial court, however, in

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its opinion, indicated that a prior right should be recognized in the defendant for the irrigation of 3,000 acres of hay land and 2,500 acres of pasture, aggregating 5,500 acres. Its basis for the duty of water was approximately 3 acre-feet for hay and grain land and 1½ acre-feet for pasture.

The testimony on the part of the defendant relating to the diversions of water upon the lands claimed to have been irrigated, the dates diversions were made, the amount diverted, the specific lands to which the use was applied, and the seasonal application, is quite voluminous, and, as it covers many years, depending very largely upon the memory of witnesses, it is wanting in that specific and exact detail that one would wish to make it altogether dependable and reliable. Such a state of the record requires, therefore, the application of the greatest care and diligence in resolving the ultimate facts upon which to pass the decree.

The defendant's stock ranges, located along Salmon river and its tributaries in both Idaho and Nevada, are at an elevation ranging from 5,200 feet to 5,700 feet above sea level. The growing season for crops of grains and grasses is consequently short as compared with lower levels. That such crops may be satisfactorily and profitably produced cannot be questioned; but as to grains and alfalfa, it may be conceded that they cannot be produced in such great abundance as on the lower levels. For instance, but two crops of alfalfa can be produced during the season, while the usual croppings in the lower levels are three. The testimony in the record shows that, during the whole time these ranges have been occupied down to the time that this controversy arose, there were but about 21 acres of wheat and 27 acres of oats grown on the entire ranges. This is evidentiary in a way of the adaptability, or want of adaptability rather, of such lands for profitably producing such crops. The inference is that such crops were not economically profitable for the stock industry, or the lands were not profitably adaptable for growing the same, taking into consideration, along with the quality of the soil, the short seasons and the convenience or inconvenience of marketing owing to the distance from marketing centers. These lands up to this time have not been generally occupied for residential or home purposes, and but few cabins have been maintained upon the ranches, and those only for the habitation of range riders or caretakers of stock, while the stock was being provided with feed in the late fall or winter season.

In a general sense, the manner of irrigating the lands was by the flooding system; that is, depending in a measure on the flood waters that came down along about the month of June in such quantities as to overflow the banks of the streams, but more generally upon the construction of dams and barriers in the streams, by rude and unscientific methods, to throw the water out in such quantity as to cover the lands, and allow it to remain thereon a considerable length of time. The waters thus thrown out upon the land are controlled more or less by the construction of ditches and conduits for carrying them upon lands that they would not ordinarily reach in the usual course when thrown out of the natural channel. The ditches, most of them, until

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later years, were of primitive construction, and in many instances were so laid as to make use of the sloughs and swales for conducting water to places of advantage. Latterly some of the ditches were built with greater attention to scientific construction, the most conspicuous of which is the Harrell ditch, which will be especially treated of later. Generally the water was used for producing the natural grasses indigenous to those localities, including the rye grass, a very nutritious article of food for stock. In considerable measure the native grasses were produced in such quantities as to be cut for hay, and were so cut and fed to stock as occasion demanded; but by far the larger proportion of the area thus irrigated was utilized for pasturage only. This pasture land generally lies contiguous to the streams and the natural runways for the water. Much of it is grown over with willows in greater or less density, and other parts are occupied by sloughs and swales, where to some extent a coarse grass grows upon which the stock browse. In the more recent years water has been thrown over considerable areas of land covered with sagebrush, for the purpose, it is claimed, of promoting the growth of the natural grasses found there for pasturage purposes. This is upon the higher levels, and at best the grass found there is insignificant in quantity. By reason of the water table being near the surface, and the natural percolation that takes place in the soil, and considering also the overflooding, this method of irrigation results in the lower levels in returning very large quantities of water to the natural streams.

Having made these general observations, which apply practically without question, we will proceed to a consideration of the testimony.

We can best get at the most satisfactory results by a comparison of maps which have been introduced in evidence as exhibits, considering along with them the testimony giving statistics as the result of witnesses' observations.

The witness L. W. Beason made measurements and surveys of defendant's property in 1914, and was engaged in the work, he and his subordinates, about eight months. This, it must be observed, was some seven or eight years after plaintiffs made their first appropriation. After relating what ditches he found, giving their measurements and capacities, the witness produced a map, defendant's Exhibit No. 11, covering the Hubbard and Vineyard ranches, which shows by the coloring the hay and pasture lands; the total acreage being, hay land 866.7 acres, and pasturage 1,728.3 acres. He also produced defendant's Exhibit 12, a map which covers the Salmon river or San Jacinto ranch, extending from Bird's Nest to Boar's Nest, with different colorings indicating the different kinds of lands, such as first-class pasture lands, second-class pasture lands, etc. He gives the area of each class, all claimed to be under irrigation, as follows:

First-class pasture land	2,501.2	acres.
Second-class pasture land	1,073.7	"
Hay land	1,766.2	"
Grain land	1,481.7	"
Seeded to timothy	242.6	"
Total	7,065.4	"

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This, with the lands of the Hubbard and Vineyard ranches added, makes a grand total of 9,660.4 acres.

The witness relates that there are none of the lands marked meadowlands, or first or second class pasture lands, that have not received the benefits of irrigation. Other plowlands were measured, not shown on the exhibit, of which there are 1,205.4 acres, all under the Big ditch. This latter must be excluded, as will appear from a consideration of the Harrell or High Line ditch. Witness also produced a map, defendant's Exhibit No. 13, covering the Bridge ranch. This shows:

Pasture land	428.0	acres.
Hay land	124.8	"
Grain land	27.3	"
Total	580.1	"

Making a grand total, comprising all these ranches, of 10,240.5 acres.

On the other hand, the plaintiffs produced one E. B. Darlington, also a civil engineer, who made observations and estimates in 1911, three years earlier than those made by Beason, and yet four or five years later than the date of plaintiffs' first appropriation. He produced maps covering the Vineyard ranch and all above that, including the Bridge ranch. These are plaintiffs' Exhibits 11 and 18. The former shows by different colorings the different lands under irrigation in that year, and the latter designates by various colors additional lands that defendant claims are under and subject to irrigation. On the Vineyard ranch the maps show:

Hay land, irrigated	429.6	acres.
Pasture land, irrigated	18.3	"
Pasture land, not irrigated	83.8	"
Total, irrigated land	447.9	"
" not irrigated	83.8	"

As to the San Jacinto ranch, not including the Bridge ranch, these maps show:

Hay land, irrigated	1,033.4	acres.
Pasture land, irrigated	788.6	"
Alfalfa land, irrigated	140.2	"
Wheat	21.0	"
Total	1,983.2	"

On the Bridge ranch:

Hay land, irrigated	150.7	acres.
Pasture, irrigated	57.6	"
Pasture, irrigable	157.2	"
Total	365.5	"

—and a small acreage of wheat.

Aside from these, there is a tract shown of 414.0 acres, designated as hay not irrigated, and another tract of 1,117.4 acres, designated as pasture not irrigated.

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To recapitulate, this shows:

Hay and pasture land, irrigated	2,639.4	acres.
Hay and pasture land, not irrigated	241.0	"
The two tracts last mentioned	1,531.4	"
Making a grand total of	4,411.8	"

This witness has not included in his maps nor in his testimony the Hubbard ranch. In making a résumé of the irrigated lands, he says:

"The total area watered from Salmon river was 2,265 acres; from Shoshone creek (Bridge ranch), 160 acres; from Jake's creek, 143 acres."

For comparison, we should add to this estimate the Hubbard lands, comprising, as shown by defendant's Exhibit 11, by a calculation of the subdivisions alleged to be irrigated, 920 acres, making a total of 5,331.8 acres. If this amount be deducted from defendant's estimate of 10,240.5, it shows a discrepancy between the figures of the parties of 4,908.7 acres.

E. C. McClellan, testifying in rebuttal for defendant, shows that the total acreage under irrigation in the year 1889 from Bird's Nest to Boar's Nest was 4,178.4 acres, and on the Vineyard ranch 814.4 acres, aggregating 4,992.8 acres, and that the total irrigation in 1904 amounted to 5,981.2 acres. These statements are discredited by certain maps which the witness himself prepared, namely, defendant's Exhibit 4, purporting to show the area under irrigation on the Vineyard ranch, and plaintiffs' Exhibit 32, exhibiting the lands under irrigation extending from Bird's Nest to Boar's Nest. The coloring on these maps shows an irrigation in solido of all lands within the delineations. The representation as to the latter district is disproved by Beason's map, defendant's Exhibit 12, and as to the former is plainly disputed by other testimony in the case.

Pursuing the inquiry further, relating to lands under irrigation elsewhere, according to Beason's testimony, defendant's Exhibit 7 covers lands on Trout creek, which are, as estimated, 50 acres of hay and 170 acres of pasture; defendant's Exhibit 14, being of the Nall ranch, shows hay 53.4 acres, and pasture 104.3 acres; defendant's Exhibit 15, Shoshone Basin ranch, 127.0 acres of hay, and pasture 914.7 acres—a total of 1,419.4 acres. This enlarges the discrepancy to 6,328.1 acres, for the plaintiffs' testimony takes no note of these lands.

Resting the deduction here for the present, particular reference will be made to the testimony of Darlington given in rebuttal, he having produced a composite map, plaintiffs' Exhibit 33, on which irrigated lands are designated in red and lands not irrigated in green. Speaking from the map, he says:

"On that part of plaintiffs' Exhibit 33 showing the Vineyard ranch, colored in green, the land was very largely in sagebrush, rye grass and partly incrusted with alkali. We could find no evidences of irrigation. We searched for it. A strip on the east side of Jake's creek and running down the west boundary of the tract was covered with sagebrush. It is the tract lying between the field colored red and the Tunnel ditch. It is the land shown on defendant's Exhibit No. 4 as being irrigated. * * * Where it is hatched in red has since been cleared."

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Referring to a photograph taken near the crossing of the Tunnel ditch and Jake's creek, the witness continues:

"The sagebrush land in the foreground of this picture shows the land that was excluded. That land didn't bear any evidences of having been irrigated. I didn't find any ditches on it. I walked over it, just observing general conditions. I didn't make any special search for ditches at that time. I made observations with the view of finding any sources of irrigation and the land that was being irrigated. The land at the north and east of the field in red on plaintiffs' Exhibit 33 down the river and which is colored in green on that exhibit, was grown up to willows and is not irrigated so far as I could find. There are no evidences of any irrigation or ditch lines. The land from the northerly limit of what is colored green on plaintiffs' Exhibit 33, as part of the Vineyard ranch, and the little strip of green which appears at the southern line of section 20, 45 north, is a narrow canyon overgrown with willows in the bottom. There are no ditches along there. The land in sections 20 and 21, 45 north, and 17 and 16, 46 north, colored in green on plaintiffs' Exhibit 33, is overgrown with willows and cut up with sloughs. There was no evidence of artificial irrigation. There is evidence of overflow by the river during high water season. The land in township 45 north, at the east of the strip colored red on plaintiffs' Exhibit 33, and colored green on that exhibit, claimed by the defendant to be irrigated, is overgrown with willows and cut up with sloughs. I could discover no evidences of any ditches there. A large part of it would overflow during high water of the river. There are sloughs through it, which in 1911 were overgrown with willows and sagebrush. I could see no signs of any systematic use of them for irrigation. By systematic I mean artificial use, where water had been directed and controlled. I think those lands have not been cut over; they are covered with sagebrush and willows. The land in section 34, between the two fields colored red on plaintiffs' Exhibit 33, colored in green on that exhibit, is overgrown with willows and other brush, and cut up by sloughs. The land in sections 22, 23, and 14, township 46 north, colored in green on plaintiffs' Exhibit 33, is very largely in willows, rabbit brush, and some sagebrush. I couldn't find any that had been irrigated. The island south of the lane is largely sand bars and gravel bars. The lane is represented by the white strip not colored, extending through section 14. South of that was sand and gravel bars and sagebrush. The island north of the lane, colored in red, is cut up by sloughs and willows; not so much sagebrush north of the lane. On the entire ranch from Bird's Nest to Boar's Nest, I would say there are between 500 and 1,000 acres covered with willows. In some places they widen out into wide strips and in other places there is just a fringe along the bank. The river bank throughout this entire ranch from Bird's Nest to Boar's Nest is low relative to the surrounding country. The river overflows and floods a large part of it at certain times of the year. It would overflow a considerable part of it without dams in the river. The land I have colored green and hatched in red represents land that has not been either cleared or in cultivation since the extension of the High Line ditch beyond the lane. The explanation I have made as to the condition of the land that is colored green and not included as irrigable land, extends to other parts of the map and to which my attention has not been particularly called."

C. B. Stocking, another witness adduced for the plaintiffs, testifies referring to plaintiffs' Exhibit 33:

"Taking the land north of the lane between the border of the red line and the east line of the river, there is a strip of land north of the lane, and partly south of the lane, of 1,117.4 acres; it extends north about a mile. I have included that as pasturage not irrigated. It evidently is inundated in high water, but the main part of it is covered with sagebrush and willows. The willows are very thick in places and very wide in places; at the upper end they cover practically the entire strip from the east channel of the river over to the boundary of the irrigated land. North of that I have an area of 414 acres, classified as hay, not irrigated, on the island. There

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were willows lining the banks of the stream and scattering willows across the island. There were no ditches at that time. I looked the island over quite carefully and found no indications that there had been any ditches. The river in high water evidently overflowed. The land that is east of the east fork of the river, which would now lie under the Big ditch as constructed, was at that time entirely covered with sagebrush. It was not under any ditch that was then carrying water, and the acreage was computed as lands that could be brought under the ditch. Going south of the San Jacinto lane, up as far as Middle Stacks, is an area which was included in this 1,117.4 acres as pasturage not irrigated. The land that is south of the San Jacinto lane, included between the branches of the river, is land that is covered with sagebrush, gravel bars and willows. Over towards the west fork of the river there are large gravel bars and in sections down in the bottom the sagebrush is very thick, making walking difficult. On the land south of the lane and east of the west branch of the river, marked or corrugated on plaintiffs' Exhibit 33, is sagebrush and rabbit brush. There was no grass that I could find in the sagebrush, with the exception of right along the river bank. There was a strip probably 300 feet wide of rye grass that was quite tall in places; it grew in bunches. From the looks of it, it had not been cut that year, because it interfered with the sights of our transits. Between the Upper Middle Stack and what is known as the Big ditch, I have marked a strip designated as brush, containing 57 acres. I could find nothing in it but brush; no grass whatever; practically bare. In the strip that is green going from the Lower Middle Stack to the Upper Middle Stack, and the strip in green composed of the river and willows, I could see nothing that had been irrigated; nothing but brush, no rye grass to speak of. That is the condition all the way up through the Upper Middle Stack. I traversed the west side of the river, and the southern part is included in pasture designated as being irrigated, but which is more than 50 per cent. covered with sagebrush. It is very rough and some rye grass grows down towards the river banks. On the east side of the river there was nothing that I could find but sagebrush, and no more grass than would ordinarily grow in the sagebrush. From the head of the Bird's Nest ditch, going over to the east branch of the river, there is a mass of willows that is almost impenetrable. We had to keep watch of the boys going through to see that they did not get lost. That is the condition to Contact and above. At the place marked green here the river is in a narrow, rocky bottom, with willows on the bottom and I think a little grass between the clumps, such as you would ordinarily see down on the river bottom. At the upper end of the Vineyard ranch, going up towards the mouth of what we call the old Vineyard ditch, is a strip of green of 42.3 acres, marked as pasture not irrigated. That lies down below the bluffs right next to the river and is fringed with willow clumps scattered through it, used as pasture, and in my judgment would be overflowed when the river got to a little lower than its highest mark. There are no ditches there. The section lying north of the Vineyard and between the boundaries of the Tunnel ditch, was grown up to sagebrush and rye grass. On the east side of this border of grass is sagebrush and rabbit brush and rye grass scattered through. From the appearance of it it had not been cut. It was in bunches and where you find bunches you will find rye grass up probably two or three feet high. The north end of the Vineyard is what is known as Starvation field. There was no grass to be found. It was willows, sagebrush and bare ground. It is alkalied. Down below Starvation field, as far as it is colored, is simply willows. Sagebrush comes down to the willows. The willows bordered the river for a distance on each side, and there was no grass."

[1] Now, it must be admitted that there is a wide difference between these estimates on the part of plaintiffs and defendant; but if the real facts were known as of the time of plaintiffs' appropriation, it is believed that the difference would be, in great measure, reconciled. Plaintiffs' surveys and estimates were made three years earlier than those of the defendant, and the space of time intervening would, if

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the facts were absolutely known, in all probability account for much of it. It at least renders plaintiffs' testimony the more reliable, because the plaintiffs are speaking of a time much nearer the time of plaintiffs' appropriations. Furthermore, the testimony above specially alluded to goes very strongly to the discredit of defendant's estimates, so that one cannot say that they are in a reasonable measure reliable. We are impelled, therefore, considering also the entire testimony, to give the greater credit to the plaintiffs' estimates. In final conclusion on this phase of the case, taking the plaintiffs' estimates, there are included the two tracts of 414 and 1,117.4 acres respectively. Stocking says the former tract consists of wild hay irrigated; that "this is low-lying land along the river. The river flows on both sides of it, and it is covered with willows and wild grass. I never found any irrigating ditches on it." The latter tract, which he mentions as containing 1,117.4 acres, he says is wild land; that "this is grown up with sagebrush and wild rye grass and willows and has never been irrigated." If the aggregate of these tracts be deducted from the total of 5,361.8 acres, there would remain 3,830.4 acres. Or if the latter tract only be deducted, there would remain 4,244.4 acres. In one aspect or the other, these figures represent lands irrigated from the Bridge ranch to the Hubbard ranch, inclusive. This gives credit for the entire amount that defendant's maps show was irrigated on the Hubbard ranch, namely, 920 acres. Deducting these figures from the trial court's estimate of 5,500 acres, there is left in the one case 1,669.6 acres, and in the other 1,255.6 acres. This latter figure is in all probability quite sufficient to cover all irrigated lands comprised by the outside ranches.

[2] We concur with the trial court's estimate of 5,500 acres, as comprising all the lands which were under irrigation at the time of plaintiffs' appropriations.

The foregoing conclusion, it will readily be seen, is in anticipation of the inquiry as to the extent to which the appropriation of water by means of the Harrell or Big ditch is prior to the plaintiffs' appropriation. In reality, the two subjects are distinct one from the other, and require separate discussion and treatment.

The first construction of the Harrell ditch was to take the water out of Salmon river in the northeast quarter of section 9, township 45 north, range 64 east, and run it into Roland East Side slough, which was but a short distance. The next was to capture the water from Roland slough, in the southeast quarter of the northwest quarter of section 34, in township 64. "It extended along the east side of the bottom," says McClellan, "and up to 1904 had been carried about three miles in length, to a point opposite the San Jacinto lane, and for another quarter of a mile was partly constructed." The present location of the ditch was made in 1892, after which McClellan relates he ran a line for the Harrell ditch throughout its entire length. This was done in September, 1897, and construction commenced immediately afterwards. That, he relates further, is the ditch which was constructed entirely down to the San Jacinto lane, and perhaps a little below, in 1904. On cross-examination of McClellan, it appears that the Harrell

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ditch was constructed from the river to the Roland East Side slough in the fall of 1893. The next spring the slough was enlarged for a distance of perhaps a mile. Moore did some work on the ditch in 1894. In 1897 the ditch was started from the Roland slough. It was laid out 77 chains in length, and nearly, if not all, constructed that fall. That work carried it to a point "a good three miles and a half above the San Jacinto lane." The next September (1898) the extension of the ditch was laid out to a point opposite the San Jacinto lane, 330 chains in all. The terminus of the Harrell ditch in 1909 was the same as in 1904. The witness laid out some work in 1909. He surveyed from a point a quarter of a mile north of the San Jacinto lane to the point of crossing Trout creek, since which time he has had nothing to do with the ditch.

Darlington first saw the Harrell ditch in 1910. It then had been built to a point about 300 yards below the road in section 13. There was a strip of sagebrush land all along the canal until it got up near the head, and then wild hay meadows along the river. In 1911 most of the land on the San Jacinto ranch between the river and the Harrell ditch was still in sagebrush. At that time some land had been irrigated from the Roland slough, and a little strip from the Harrell ditch. During the year 1911 the Harrell ditch was built to a point probably a mile and a half further north, and somewhat east into section 7, and since that time has been extended almost to Shoshone creek. About 5,000 acres were brought in under the new construction.

Hugh McGuire relates that he did some work on the Harrell ditch in 1901, namely, extending the ditch from the lane to the old work, and that the first extension after that was in 1904, when it was constructed across the land about a quarter of a mile. That part was not used for irrigation while he was there, and it was in that condition to the end of 1906, when he left.

Adam Patterson testifies that he took charge of the defendant's properties November 1, 1908, and that they built the Harrell ditch from San Jacinto lane to a point north of where the ditch makes a big bend. This extension was made in the latter part of May or the first of June, 1909. McClellan had laid out the line. The big bend that the witness alludes to, probably, is in section 1, township 47, range 65.

Thomas R. Beason testifies that he went upon the defendant's property in 1910. At that time the Big or Harrell ditch was not completed; the upper end of it was used for irrigating land above the lane. There was work done on the Big ditch in 1910, 1911, and 1912, and it was completed to the present terminus in 1912. In 1911 they cleared 500 or 600 acres, and put a couple of hundred acres in grain in 1912. In 1913 the total cleared and broken was 1,700 acres, and in 1914 about that area was sowed to oats, and they broke up 1,200 acres additional. On November 28, 1892, the Sparks-Harrell Company filed notice of location and claim of water to be diverted from Salmon river sufficient to irrigate some 4,000 acres, which relates to the intended appropriation by the Harrell ditch, and on June 12, 1899, filed an amended notice claiming an appropriation of 200 cubic feet of water, and specifying more particularly the lands to be irrigated. The construction

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and diversion subsequently made are claimed to have been in pursuance of those notices.

To recapitulate: The notices for the appropriation of water from Salmon river by construction of the Harrell ditch were filed, the first in 1892, and the second in 1899. In 1897 McClellan ran the survey for the ditch throughout its entire length. The first construction was to build a ditch from the river to the Roland slough. The next construction was to capture the water from the slough some distance below by means of the ditch, which was extended 77 chains in the fall of 1897. The next extension was to the San Jacinto lane. This was in the main completed in 1904. It was related that the terminus of the ditch was the same in 1909 as in 1904, and further that there was a strip of sagebrush land all along the canal, extending up to near its head. This was the case still in 1911. There was an extension in 1909 to the big bend, and in 1910, 1911, and 1912 the ditch was extended to its present terminus. In 1911, 1912, 1913, and 1914, large areas under the ditch were reduced to cultivation, and presumably water was applied thereto from the ditch.

The inquiry is, to what extent was there an appropriation of water prior to the plaintiffs' appropriations, the first of which was made in 1906?

There can be no doubt that, if all this extension of the High Line canal had been made and the water applied to the lands under the canal prior to plaintiffs' appropriations, defendant would have had the better right. The defendant and its predecessor, however, have been dilatory in maturing their appropriation, and, if they have not acquired a superior right, it is because of their lack of diligence in applying the water to the soil. Five years elapsed before the construction of the ditch for any considerable distance, after the project was entered upon by filing the notice of location and making survey of the line, and 7 years additional elapsed before its extension to the San Jacinto lane. No further extension was made until five years later, when the ditch was partially constructed to the big bend, and it was not finally completed until two years beyond that time. No considerable effort was made to apply the water to irrigation purposes on the sagebrush land lying under the ditch until 1911, which was about 19 years after the project was entered upon.

[3, 4] An appropriation of water from a public stream may be initiated by notice, now required to be given by law in some, if not all, of the arid states, or by actual diversion from the stream. Either process is evidentiary of the intent on the part of the person giving the notice to make an appropriation. In the former case, the notice would indicate the amount of the intended appropriation; in the latter, the capacity of the ditch or conduit by which the diversion is actually made would be indicative of the appropriator's thought as to the amount of water designed for use. These methods are only initiatory of the appropriation. Other steps must be taken before the appropriator's purpose can ripen into a completed appropriation. These first steps, however, will enable the appropriator to claim his right as

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against subsequent appropriations until his scheme has been completed. It has been said that:

"The diversion of the water ripens into a valid appropriation only where it is utilized by the appropriator for a beneficial use." Hewitt v. Story, 64 Fed. 510, 12 C. C. A. 250, 30 L. R. A. 265; Walsh v. Wallace, 26 Nev. 299, 67 Pac. 914, 99 Am. St. Rep. 692; Nevada Ditch Co. v. Bennett, 30 Or. 59, 45 Pac. 472, 60 Am. St. Rep. 777.

See, also, Wiel on Water Rights in the Western States (3d Ed.) § 478.

[5] It is a principle of law, recognized by authorities, that an appropriator must exercise reasonable diligence, after he has initiated an appropriation, in applying the water to a beneficial use. If he fails in this, he will be held to have abandoned or forfeited his right, as it may affect appropriations acquired in the meantime. He cannot play the dog-in-the-manger act, and expect for all time to deprive other intended users of the benefits to be derived from appropriations regularly and legally instituted or made. The Ophir Silver Mining Co. v. Carpenter, 4 Nev. 534, 97 Am. Dec. 550.

[6] "Diligence," as here employed, is largely a relative term, and its proper application is to be determined by the facts in each particular case as they are made to appear. What would be accounted diligence under a particular state of facts might not be so accounted under different circumstances. Thus a person making an appropriation for the irrigation of a small tract of open land ready for the plow would be expected to apply the water to the beneficial use intended in a much shorter time than one making a diversion for application upon a large tract, where it was necessary to clear the land of brush and shrubbery found thereon before it could be made adaptable to cultivation. And, again, the means that the intending appropriator has at hand, whether meager or ready, has an important bearing upon the situation, and will be taken into account as to whether proper diligence has been employed.

[7] In the light of these observations, we may determine whether the defendant company and its predecessor, the Sparks-Harrell Company, had employed proper diligence in reducing their intended appropriation to a beneficial use prior to the time when the plaintiffs made their appropriations. From the time notice had been given by Sparks-Harrell Company of its intention of making its appropriation, namely, November 28, 1892, to the time of plaintiffs' appropriation, more than 14 years had elapsed, and yet the Big ditch had not been constructed from a point a quarter of a mile north of the San Jacinto lane. Some progress had been made before that time from the head of the ditch at its junction with the Roland East Side slough, but the ditch had been constructed only to the San Jacinto lane in 1904, which was 12 years after the notice was given, and 7 years after McClellan made his survey of the proposed High Line ditch. In the meantime, from 1904 up to the date of plaintiffs' appropriation, no attempt had been made to reduce the sagebrush land under the ditch to cultivation, although the water had been thrown out upon it for the purpose of producing in greater abundance the native grasses found among the sagebrush. The grasses there found were scanty and sparse; nor did irrigation serve largely to promote their growth. The employment

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of water for this purpose can scarcely, in this day of agricultural progress in the arid states, be classed as a beneficial use. Further, it does not appear but that the defendant's predecessors had means at their command for constructing this ditch and applying the water to the lands under the ditch in a very much shorter time. Indeed, when the present company once entered upon the work in earnest, it appears that it not only constructed the High Line ditch to its terminus, but reduced the greater part of the lands under it to cultivation in the space of 4 years, from 1911 to 1914.

We conclude, therefore, that because of the want of diligence on the part of the defendant and its predecessor in constructing the High Line ditch and the application of the water through it to a beneficial use, defendant has lost whatever initiatory rights it may have acquired to an appropriation, in so far as it affects the plaintiffs' appropriations, and must be relegated to their superior and paramount rights.

[8] We come now to the subject of the duty of water. The law in Nevada respecting the same seems to be fairly well settled:

"No person can, by virtue of a prior appropriation, claim or hold any more water than is necessary for the purpose of the appropriation. * * * It must be exercised with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use, and vest an absolute monopoly in a single individual." Barnes v. Sabron, 10 Nev. 217, 243, 244.

An appropriation does not extend in a legal sense to any water except such as is used beneficially. Dick v. Caldwell, 14 Nev. 167.

An appropriator is entitled only to the amount of water he needs, economically and reasonably used, and when he has that he cannot prevent others from using the surplus. Roeder v. Stein, 23 Nev. 92, 42 Pac. 867, 868.

"The law is that an appropriator is only entitled to so much water, economically used, within his appropriation, as is necessary to irrigate his land. The necessary amount of water varies with the seasons." Gotelli et al. v. Cardelli et al., 26 Nev. 382, 69 Pac. 8.

"Cutting wild grass produced by the overflow of the river, or, as expressed by the witnesses, by the water of Reese river coming down and spreading over the land, was not an appropriation of that water, within the meaning of that term. Neither was the grazing of the land an appropriation of the water, under the facts." Walsh v. Wallace, supra.

See, also, Union Mill & Mining Co. v. Dangberg (C. C.) 81 Fed. 73.

The statutes of the state on water rights and irrigation promulgate a like policy, and are in harmony with these views.

Other states have adopted the same principle. The Supreme Court of Idaho has this to say on the subject:

"In determining the duty of water, reference should always be had to lands that have been prepared and reduced to a reasonably good condition for irrigation. Economy must be required and demanded in the use and application of water. Water users should not be allowed an excessive quantity of water to compensate for and counterbalance their neglect or indolence in the preparation of their lands for the successful and economical application of the water. One farmer, although he has a superior water right, should not be allowed to waste enough water in the irrigation of his land to supply both him and his neighbor, simply because his land is not adequately prepared for the economical application of the water." Farmers' Co-operative Ditch Co. v. Riverside Irrigation Dist., 16 Idaho, 525, 102 Pac. 481.

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Of like effect is Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083.

[9] The trial court, by a careful analysis, having in mind, no doubt, the Herrington report, which was not introduced in evidence but referred to by counsel and stipulated that it might be considered, has concluded that 12,500 acre-feet was sufficient to answer the needs of the defendant under its appropriations, which seems to us to be a fair and equitable estimate. It is unnecessary to follow the reasoning here. Some observations pertinent to the inquiry may be indulged in, however.

[10] The court has allowed practically 3 acre-feet for 3,000 acres, and 1½ acre-feet for 2,500 acres. Practically all the land to which the appropriations were applicable is low and nearly level, and lies at only a slight altitude above the water as it flows in the streams, and by reason of percolation from the streams and the sloughs which traverse the territory in some sections, and the nearness of the water table to the surface of the soil, must receive considerable subirrigation, the amount of which, of course, is not readily ascertainable. Such land, as reason suggests, does not require the same amount of surface irrigation as land lying at a higher level, or table-land, where its only source of irrigation is from the surface. It is argued that the measurements of water taken in 1914, which form the basis of the Herrington report, do not include the Hubbard, Nall creek, Upper Trout creek, Big creek, and the Shoshone Basin territory. True, that is the case. But in that year defendant was absolutely free to use all the water it cared to, and probably used it upon all the lands that it now claims were subject to irrigation in that year, on the Vineyard, San Jacinto, and Bridge ranches, which comprised a larger area than that which we now find, from a consideration of all the diversions upon all the ranches, the defendant is entitled to irrigate with prior right to that of plaintiffs. Further than this, the hay land claimed to be irrigated in 1914 on these ranches is small in area in proportion to the pasture land.

It is urged also that the irrigation season commences April 1st, and not May 1st as found by the court, and that the estimate of water suited to the needs of defendant should be increased proportionately by reason thereof. The witnesses who have spoken on the subject agree that irrigation in previous years began on defendant's ranches about April 1st, and to this there seems to be no contradiction. The system in that time of the year was evidently by simply flooding these hay and grass lands. The witnesses also seemed to think that kind of use was beneficial in producing an increased amount of hay and grass, but it is certainly not the highest use to which it may be devoted, at any rate as it respects the irrigation of pasture.

Mr. Bark, who has made a study of irrigation, says:

"Up to a certain point the more water the more pasture, and it will require fully twice as much as for grains. I don't think I ever found the point in the pasture lands after which the application of more water would result in no increase, or an actual decrease, of the crop, because we never put water enough on. We have put about 4½ acre-feet on upland pastures and we still got more pasture."

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The witness does not claim to have any scientific information as to the amount of water it would require for producing wild hay and pasture under conditions existing with respect to defendant's lands, where irrigation has been previously applied. He says, however:

"Under those conditions I think there is no method by which the amount of water so diverted upon the land could be measured, because it gets a lot of it by capillary attraction, subirrigation laterally."

A table was produced showing the duty of water for alfalfa. It was put in evidence, and shows a constantly increasing yield, as the water was applied in six divisions, beginning with 1.18 acre-feet and ending with 3.78 acre-feet to the acre. It will be observed in the fourth division, with the application of 2.61 acre-feet, there was produced 5.6 tons to the acre, with 2.14 tons to the acre-foot. The fifth division shows the application of 2.99 practically 3 acre-feet, with a production of 6.59 tons to the acre, or 2.20 tons per acre-foot. The sixth application was of 3.78 acre-feet, with a product of 6.8 tons per acre, and 1.8 tons per acre-foot. There was a constantly increasing soil moisture left at the close of the season, running from 10.08 to 19.44 per cent., except that in the fourth division there was 17.12 per cent. against 16.92 per cent. in division 5. Thus it is shown that there is a point where the economic application reaches its maximum utility. It appears by the fifth division that, by the application of approximately 3 acre-feet, 6.59 tons were produced to the acre, being 2.20 tons to the acre-foot; while the sixth division shows an increase in tonnage per acre, there is a substantial decrease per acre-foot. We may test the economic utility by supposing the grower was buying the water with which to irrigate his land. Would he pay for the increased supply and take the larger yield, and the less percentage of yield per acre-foot, or would he be contented with the smaller yield, as indicated by division 5, and pay more than proportionately less for the water? He would probably do the latter, since the larger yield is only about $^{2}/_{10}$ of a ton per acre above the smaller, while the increase of his water purchase would be about $^{78}/_{100}$ of an acre-foot to the acre. This demonstrates that the allowance of 3 acre-feet to the acre for alfalfa is as much, probably, as could be economically applied.

The witness Bark says that the water required for the irrigation of hay is about the same as for alfalfa. The experiment whereby the table was produced was evidently on upland. He says further, in effect, that if you keep putting more water into the soil and leaving more thereon at the end of the season, unless you have excellent drainage, you will water-log your land in a short time, and render it valueless.

Following the witness further, he is of the opinion that pasture needs about 10 light irrigations per year, extending from about April 1st to September 30th, or possibly into October. He explains that pasture is of shallow-rooted grass, and there is no need to soak it deep, but that a light irrigation should be oftener applied. A light irrigation, he further explains, is about 3 acre-inches, which, if reduced to acre-feet, there being 10 irrigations per season, would amount to 2½ acre-feet for that time.

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"That method is adopted," says the witness, "on pastures that are grazed continuously during the summertime so as to keep up the growth of grass. I don't think it would require as much water, although I don't pose as an expert in that particular line, to produce a growth that was to be grazed off after the summer range has been exhausted, as it would if you had stock on it all the time. * * * It usually takes a little less water where the altitude is higher; there isn't so much evaporation, cooler nights, and the season is shorter."

Considering further, then, what is to be found in the discussion by this witness, as has been previously remarked, from the fact that defendant's hay and pasture lands lie low and approximately level, with the water table near the surface and the percolation from the streams and sloughs considerable, we are persuaded that 1½ acre-feet to the acre for the pasture lands, as allowed by the court, is quite sufficient for the economic irrigation of such lands.

There is another condition to be considered; that is, as the evidence seems to indicate, there is a time in June or early in July of each year when the water rises to such an extent that much of the land is flooded, notwithstanding the streams may be kept free from obstructions. These flood waters go to the benefit of defendant. The decree furthermore fixes no limitations upon the time of rise. So that defendant may use the water early or late, as it is disposed, so that it does not use more than the quantity prescribed during the season.

The findings of the court, as to the quantity of water to which the defendant is entitled prior in right to the plaintiffs, are therefore approved.

The defendant challenges the jurisdiction of the court to make provision in its decree as follows:

(a) That defendant must use the waters constituting its prior right only upon certain lands irrigated prior to 1907; (b) that it must install in its canals and ditches automatic measuring devices and refrain from the use of any water for the irrigation of its lands without the use of such devices; (c) that such measuring devices shall at all times be subject to the inspection of the plaintiffs, who shall have the right perpetually to go upon and over defendant's lands in Nevada for the purpose of such inspection; and (d) that the court retain jurisdiction to make rules touching the manner of diverting, measuring, and distributing the waters belonging to defendant in Nevada, and for directing that defendant "keep accurate and detailed records of the amounts of water diverted and to require reports to be filed from time to time of the amounts so diverted, and generally to make such orders as may be found reasonably necessary to give effect to the decree, and to appoint commissioners or watermasters to make distribution in accordance with its terms."

[11] The question is presented as to the extent to which the judgment and decree of a court exercising jurisdiction in one state may become operative in another. And, incidentally, it is urged that, as to the waters of streams which are interstate in character, their benefits should be equitably distributed between the states through which they flow. The thought comes from the suggestion of the court, in Kansas v. Colorado, 206 U. S. 46, 117, 27 Sup. Ct. 655, 51 L. Ed. 956, that

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there might come a time when such a distribution would have to be made of the waters of the Arkansas river. A sufficient answer to the contention is that the pleadings and evidence in this case disclose no such condition as to require an equitable distribution of benefits of the waters of Salmon river and its tributaries between the states of Idaho and Nevada; and besides, the matter is one for adjustment between the states; it is not for individual users to raise a controversy about the use of such water in another state, out of the territorial jurisdiction of the court.

[12] As to the main question, this court has determined, by the case of Rickey Land & Cattle Co. v. Miller & Lux, 152 Fed. 11, 81 C. C. A. 207, that a suit of the nature here maintained is essentially one to quiet title to real property, and that it is local and not transitory. The Rickey Land & Cattle Company, in that case, set up certain rights in California that it claimed to the waters of the stream, and we held that its cross-complaint setting up such rights could not operate to defeat complainant's cause, but only defensively, "and not to give the defendant a right to have its title also quieted in the state of California." Hawley, District Judge, in the same case, on the trial in the District Court, had this to say:

> "It [the court] cannot, by any decree which it may make in this suit, directly reach the dams, reservoirs, or ditches belonging to the defendant located entirely within the state of California." Miller & Lux v. Rickey [C. C.] 127 Fed. 573, 575.

In this expression of the law we concur. But has the plaintiff no remedy where a defendant has been personally served and appears in the court, and is enjoined forever from doing certain things in another state to the detriment of plaintiff's rights? The authorities are clear that he has. Such a remedy was sustained in the Rickey Land & Cattle Co. Case, supra.

But it is insisted here that the decree goes beyond the jurisdiction of the court to adjudge and provide. A court of chancery is without jurisdiction to give compensation for a nuisance or tort to real property lying in another jurisdiction or state, nor can it enjoin or restrain the continuance of such a nuisance. Northern Indiana R. Co. v. Michigan Cent. R. Co., 15 How. 233, 14 L. Ed. 674; Mississippi & Missouri R. Co. v. Ward, 2 Black, 485, 17 L. Ed. 311. Nor is it within the power of such a court to declare a deed to lands in another state null and void. Carpenter v. Strange, 141 U. S. 87, 11 Sup. Ct. 960, 35 L. Ed. 640.

[13] The reason assigned for the latter holding is that, while a court of equity may in a proper case compel a party to act in relation to property not within its jurisdiction, its decree does not operate directly upon the property, nor affect the title, but is made effectual through the coercion of the defendant. That is to say, the rem may not be affected by the direct operation of the decree where it is beyond the territorial jurisdiction of the court, but the court may, acting in personam, coerce action respecting it.

Massie v. Watts, 6 Cranch, 148, 3 L. Ed. 181, is illustrative as well as declarative of a like principle. The case was instituted in a Ken-

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tucky court for the purpose of obtaining a conveyance of land in Ohio. Objection was made to the jurisdiction of the court to give the relief desired. Chief Justice Marshall, after premising that there was much reason for considering the action local in character and for confining it to the court sitting in the state where the lands lay, says:

"Was this cause, therefore, to be considered as involving a naked question of title, was it, for example, a contest between Watts and Powell, the jurisdiction of the circuit court of Kentucky would not be sustained. But where the question changes its character, where the defendant in the original action is liable to the plaintiff, either in consequence of contract, or as trustee, or as the holder of a legal title acquired by any species of mala fides practiced on the plaintiff, the principles of equity give a court jurisdiction wherever the person may be found, and the circumstance, that a question of title may be involved in the inquiry, and may even constitute the essential point on which the case depends, does not seem sufficient to arrest that jurisdiction."

After citing cases, among which was Penn v. Lord Baltimore, 1 Vez. 444, where the Chancellor of England decreed the specific performance of a contract respecting lands lying in North America, the distinguished jurist deduces the principle that:

"In a case of fraud, of trust, or of contract, the jurisdiction of a court of chancery is sustainable wherever the person be found, although lands not within the jurisdiction of that court may be affected by the decree."

The principle is rather more broadly stated in Phelps v. McDonald, 99 U. S. 298, 308 (25 L. Ed. 473), as follows:

"Where the necessary parties are before a court of equity, it is immaterial that the res of the controversy, whether it be real or personal property, is beyond the territorial jurisdiction of the tribunal. It has the power to compel the defendant to do all things necessary, according to the lex loci rei sitæ, which he could do voluntarily, to give full effect to the decree against him."

The principle, in its more comprehensive statement, was applied in Cole v. Cunningham, 133 U. S. 107, 10 Sup. Ct. 269, 33 L. Ed. 538, which was a suit by a citizen of Massachusetts to enjoin a defendant, a resident of the same state, from prosecuting an attachment and garnishment in the state of New York involving the property of complainant.

The principle was also applied by this court in Rickey Land & Cattle Co. v. Miller & Lux, supra, and was later applied in the Salton Sea Cases, 172 Fed. 792, 820, 97 C. C. A. 214. The latter cases were instituted in the superior court of California, and removed into the Circuit Court of the United States for the Southern Division of the Southern District of California, to restrain in one phase of the controversy the diversion of water in Mexico, which was beyond the territorial jurisdiction of the court. Among others, the decree contained the following provisions:

"That defendant be perpetually enjoined and restrained from diverting from the Colorado river any of the waters thereof, in excess of the substantial needs of the people dependent upon the canal, described in complainant's bill of complaint, for water supply for domestic and irrigation uses and purposes, and such other lawful purposes as the same may be applied to. * * *

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"That the said water so diverted, whatever may be the amount, shall be so controlled and used that the same shall not flow upon the lands of the complainant described in the bill of complaint. * * *

"That the defendant be required to regulate the flow of any water that may be diverted by it so that there shall be no waste water flowing therefrom as the result of such diversion upon or over the lands of complainant, above-described.

"That said defendant be restrained from turning out of its canals any waste water at any point whence the same will naturally flow upon or over the lands of complainant, or flow into the lake now covering the Salton Sink, and thereby substantially increase the amount of water therein. or maintain the amount of water therein, or prevent the decrease thereof by natural causes."

By the second and last of the Salton Sea Cases, which was in the nature of a proceeding for contempt for violating these provisions of the decree, the provisions were themselves in effect approved, although they were designed to be effective in Mexico outside of the territorial jurisdiction of the court. The object of the cases was to prevent the continuation of a nuisance being perpetrated in Mexico as well as in California, causing damage to the complainant's properties in California.

[14] Now, turning to the case in hand, the decree complained of goes but little further, if any, than that part of the decree above set out in the Salton Sea Cases. It is true that the trial court has confined the use of the water to be diverted by defendant, to which it has a right superior to that of the plaintiffs, to such lands as were irrigated prior to 1907. This is setting bounds to the territorial use of the water. Ordinarily, one having obtained the right to prior use of a given quantity of water is not restricted as it respects the place of its use, and may change it to a different locality from that where first applied. He may also change the point of diversion and the character of its use if the rights of others be not affected thereby. Union Mill & Mining Co. v. Dangberg (C. C.) 81 Fed. 73, 115.

[15] In the case at bar there is a special reason for confining the use of defendant's prior right to the lands irrigated prior to 1907. By the estimate of the trial court, in which we concur, if the 12,500 acre-feet of water is used upon such lands, by reason of percolation 8,500 acre-feet would find its way back into the stream, and the loss to the plaintiffs would amount to about 4,000 acre-feet only. If, however, the whole of the 12,500 acre-feet was carried away to another locality, where it would all be absorbed and none of it would reach the channel of the river again, the loss to the plaintiffs would be that much greater. The real condition is, when the plaintiffs' rights are consulted, that the defendant's absolute appropriation prior in time to that of plaintiffs is the 4,000 acre-feet only, because the remainder of the 12,500 feet is returned to the stream after use. So that, if the defendant is to have the use of 12,500 acre-feet of water superior in right to that of plaintiffs, in justice and equity its use should be confined to that particular locality where it was being used when plaintiffs acquired their appropriation.

Now, if the court has not the power, proceeding in personam, to restrict the defendant's use of the water to a circumscribed locality,

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it would be practically powerless to do justice between the parties litigant. We are convinced, however, from the authorities above considered, that it has such power in ample scope to protect the plaintiffs from the diversion of the water to any locality where it would conduce to their injury. It will be noted that the decree does not attempt to describe the exact metes and bounds of the lands to which defendant's appropriation was first applied, or was being applied at the time of plaintiffs' appropriation, but declares only that the same is included within certain legal subdivisions which embrace a very much enlarged territory as compared with that upon which appropriations were actually made, the purpose being to confine the use of the water to certain definite delimitations, with a view to preventing its being carried away to localities where the result would be to lessen the flow in the stream, to the detriment of plaintiffs. There is no attempt by the decree to quiet the defendant's title to its appropriations, but only to determine what they were and to what lands applicable, with a view to doing justice between the parties.

[16] It is furthermore necessary, to protect the plaintiffs against the encroachments of defendant, that the water be measured. The proper measurement is a duty personal to the defendant. It was altogether appropriate, therefore, that the court impose upon the defendant the obligation of installing automatic measuring devices, and, for the protection of the plaintiffs, these should be subject to their inspection. So it is respecting rules regulating the manner of diverting, measuring, and distributing the water and the keeping of records of the amount of water diverted, etc. These were all directions of the court operating in personam, and not directly upon the res, and were and are within the court's equitable jurisdiction to determine and declare.

[17] It is also assigned as error that the court quieted title in plaintiffs to more than 45,000 acre-feet of the waters of Salmon river. This feature of the controversy is regulated by the laws of Idaho. Sess. Laws 1915, p. 216. Under a project like this, 10 years is allowed within which to make the diversion and proof thereof for a beneficial use. The appropriation is contingent upon the use, of course, but in the larger projects the appropriation speaks as of the date of the license, though if not applied to a beneficial use within 10 years, it lapses. In the meantime no one will be deprived of the use of the water not reduced to a beneficial use under the project.

Another assignment of error relates to the refusal of the court to admit certain testimony. We have carefully examined the matter, and find no merit in the assignment.

The decree will be affirmed.

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(245 Fed. 30)

VINEYARD LAND & STOCK CO. et al. v. TWIN FALLS OAKLEY LAND & WATER CO. et al.

(Circuit Court of Appeals, Ninth Circuit. August 6, 1917.)

No. 2886.

1. WATERS AND WATER COURSES ⟹247(1)—PRIOR APPROPRIATION—EVIDENCE—SUFFICIENCY.

In a suit to determine the rights to the waters of an interstate stream claimed under the Carey Act (Act Aug. 18, 1894, c. 301, § 4, 28 Stat. 422 [Comp. St. 1916, § 4685]), evidence *held* sufficient to establish the older rights in plaintiffs.

2. STIPULATIONS ⟹14(1)—CONSTRUCTION—WATER RIGHTS.

A stipulation by defendant that "we are the owners of whatever rights we have on our side, and that you are the owners of whatever rights those people [referring to the early-day settlers] may have had on your side," was not a waiver of primary proofs showing acquirements of the rights of plaintiffs' predecessors to use the waters of the stream.

3. WATERS AND WATER COURSES ⟹240—APPROPRIATION—RIGHTS OF SUCCESSORS.

Defendants would be precluded by prior appropriations of water from the stream by plaintiffs' predecessors adequately established by the evidence.

4. APPEAL AND ERROR ⟹1008(1)—FINDINGS OF TRIAL COURT—REVIEW.

An appellate court will not disturb the findings of the trial court on questions of fact unless it be made to appear that the latter court is clearly in error in its conclusions.

5. WATERS AND WATER COURSES ⟹254—DUTY OF WATER—DETERMINATION.

Defendants could not complain that the duty of water was not measured by the old flooding system, they not being entitled to more water than they were able to apply to a reasonable and economical use.

6. WATERS AND WATER COURSES ⟹240—PRIOR APPROPRIATION—AMOUNT.

Whoever is first in time is entitled to sufficient water from a public stream for his reasonable needs.

7. WATERS AND WATER COURSES ⟹254—APPROPRIATION—ALLOWANCE—SUFFICIENCY.

In a suit to determine conflicting rights to the waters of a public stream, an allowance to defendant of three acre-feet per acre for hay and grain lands, and two acre-feet for grazing lands, *held* amply sufficient for defendants' needs, considering the acreage subject to irrigation and the dates of the appropriations.

8. WATERS AND WATER COURSES ⟹247(1)—APPROPRIATION—ALLOWANCE—SUFFICIENCY.

In a suit between defendant stock company and plaintiff, who had entered upon a project under the Carey Act of Congress (Act Aug. 18, 1894, c. 301, § 4, 28 Stat. 422 [Comp. St. 1916, § 4685]), for impounding waters from a public stream for distribution to users, an award to plaintiff of 2¾ acre-feet per acre of the land under the project *held* reasonable.

9. WATERS AND WATER COURSES ⟹247(1)—UNITED STATES DISTRICT COURT—WATER RIGHTS—JURISDICTION.

The suit being for the purpose of quieting plaintiffs' water rights in Idaho, the court was without jurisdiction to settle water rights in Nevada.

10. WATERS AND WATER COURSES ⟹247(1)—DEFECTS OF PARTIES DEFENDANT.

Where no complaint is made that others than defendants are attempting to interfere with plaintiffs' water rights within the court's jurisdiction, there was no defect of parties defendant.

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11. CORPORATIONS ⟹506—PARTIES—DEFENDANTS.

The owner of a large proportion of the stock of defendant land company, in a position to control its action, was a proper party defendant to a suit against the land company.

Appeal from the District Court of the United States for the Southern Division of the District of Idaho; Frank S. Dietrich, Judge.

Suit by the Twin Falls Oakley Land & Water Company, a corporation, and another, against the Vineyard Land & Stock Company, a corporation, and another. From the decree, defendants appeal. Affirmed.

Frank K. Nebeker, of Salt Lake City, Utah, C. A. Boyd, of Ogden, Utah, Edwin Snow, of Boise, Idaho, and C. B. Henderson, of Elko, Nev. (Howat, Marshall, McMillan & Nebeker, of Salt Lake City, Utah, of counsel), for appellants.

Samuel H. Hays and P. B. Carter, both of Boise, Idaho, for appellees.

Before GILBERT and HUNT, Circuit Judges, and WOLVERTON, District Judge.

WOLVERTON, District Judge. The defendants below are appealing. The Land & Water Company heretofore entered upon a project, under the Carey Act of Congress (Act Aug. 18, 1894, c. 301, § 4, 28 Stat. 422 [Comp. St. 1916, § 4685]), for acquiring and impounding water from Goose creek and its tributaries, and distributing it to users. Goose creek takes its rise in the state of Nevada, and crosses the state line into Idaho, and by the project the water is impounded in the latter state. In support of their water rights, the plaintiffs claim that they purchased certain rights from various users of the waters of Goose creek, which they assert are prior and superior to the rights of all other persons taking water from the stream; also that they acquired the right to the use of 500 second-feet under permit from the state, of date March 27, 1908, and an additional amount of 1,000 second-feet under permit of date March 10, 1909, which rights are prior and superior to all rights acquired subsequently to the respective dates of their appropriations.

The defendant Vineyard Land & Stock Company, by its answer, claims, on the other hand, that, long prior to any such appropriations of water from Goose creek or its tributaries, its predecessors in interest appropriated water therefrom for the irrigation of approximately 2,000 acres, with a diversion of about 40 second-feet, and that at the present time it has under irrigation about 4,000 acres, with a diversion of approximately 80 second-feet.

This presents the issues of fact. The questions of law are much the same as were in controversy in the case of Vineyard Land & Stock Co., Appellant, v. Twin Falls Salmon River Land & Water Co. and Salmon River Canal Co., Limited, Appellees, 245 Fed. 9, 157 C. C. A. 305, No. 2885 on this docket, decided contemporaneously with this case. One additional question is presented here by an amendment to the answer, namely, that there is a defect of parties, in that there are numer-

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ous persons in Nevada, Utah, and Idaho who have, or claim to have, rights and interests in and to the waters of Goose creek and its tributaries, who are not made parties defendant to this suit.

[1, 2] The first question for discussion is brought into the record by the contention of counsel for defendants that plaintiffs have not established the older rights to the waters of Goose creek, being such rights as are claimed by them as of prior origin to those claimed under permits from the state of Idaho. It is asserted, in effect, that plaintiffs' case as to these rights is wanting in primary proofs of the acquirement thereof by the early settlers to whom the plaintiffs claim to be the successors. Counsel for appellees seem to think that the necessity of such proofs was waived by stipulation of opposing counsel, and cite the statement of Mr. Boyd, as follows:

"In other words, that we are the owners of whatever rights we have on our side, and that you are the owners of whatever rights those people [referring to the early-day settlers] may have had on your side."

We do not understand that this stipulation is a waiver of such primary proofs. But, considering the nature of the rights to be established and the great lapse of time that has intervened, we are satisfied that the proofs made are quite sufficient upon which to deduce their acquirement by the early-day settlers. Certain decrees of the District Court of the Third Judicial District of the Territory of Idaho, two in number, were offered and received in evidence. The first of these bears date September 10, 1886, and the second March 19, 1892. These decrees purport to settle certain water rights between the parties litigant, there being a large number of them. These water rights are the same as the early-day settlers are supposed to have acquired by diversion from Goose creek. The defendants in this case were not parties to either of such causes.

Benjamin Howells, who was produced as a witness for plaintiffs, relates that he first went to the vicinity of Oakley in 1878, and was there in 1880, 1881, and 1888, and distributed the waters of Goose creek as watermaster. Referring to a map (Plaintiffs' Exhibit 12), he was able to recognize the several canals and ditches taken out of Goose creek, and to locate the lands upon which the water was used. He says:

"In 1888 I distributed the waters on Goose creek over most all of the country shown in green on Plaintiffs' Exhibit 12. I would approximate the acreage at 6,000 to 6,500 acres; perhaps not all irrigated that year, but as much as could be with the supply of water we had."

Then he goes on to state the number of acres irrigated in 1878, 1879, 1880, and so on. He says, further:

"People were coming into the country and developing it, in small tracts at first, and then increasing, and along as the settlement grew older more people came in. * * * The waters of Goose creek and its tributaries were used by these farmers from year to year. In 1888 and subsequent years many of the ditches were able to carry much more water than we had for them. * * * There was about 6,500 acres effectively cultivated. * * * Prior to the construction of the reservoir system the people began irrigation as soon as possible in order to get their hay lands, alfalfa lands, and so on irrigated up as early as possible in the spring."

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The testimony of the witness Sol. Worthington has an important bearing upon the same subject.

By the decrees one is enabled to ascertain the names of the users, where diversion was made, and the amount of water claimed, so that but little remains to conjecture. When we consider that water rights are acquired by diversion and use, here is ample evidence of diversion and use which continued for a considerable space of time, and, while there is no one to say that he on such a date opened a ditch, and took out a certain quantity of water, and applied it to a certain tract of arid land for producing crops, the fact does appear, to the satisfaction of any candid mind, that the water was diverted by settlers and devoted to a useful purpose, and these settlers claimed water rights by reason thereof, and plaintiffs are their successors in right and interest. The decrees make that specific which otherwise would remain indefinite and uncertain.

[3] True, defendants were not parties to the suits giving rise to these decrees, and are not precluded by their findings; yet they are precluded by the appropriations of these early-day settlers, which we hold to be adequately established by the evidence alluded to, considered with such other evidence in the case as bears upon the subject.

It is further insisted that the court erred in its findings touching the quantities of water granted in pursuance of these early settlers' rights, and the dates of the inception of such rights. The evidence respecting these matters is voluminous, and a discussion of it in detail cannot well be embodied in an opinion of reasonable length. Suffice it to say, therefore, that we have carefully examined the whole of such testimony, and fully concur in the findings of the trial court. The same conclusion has been reached as to the quantities of water awarded the defendant Vineyard Land & Stock Company, and the dates of the inception of the rights to which they pertain.

[4] An appellate court will not disturb the findings of the trial court on questions of fact unless it be made to appear that the latter court is clearly in error in its conclusions. Not only is there no such error apparent here, but we quite agree that the trial court's findings are wholly sustained by the testimony.

[5-7] Much is said about the duty of water. The lower court has awarded to the plaintiffs 2¾ acre-feet per acre of the lands under their project, and to the defendant Vineyard Land & Stock Company at the rate of 3 acre-feet per acre for its hay and grain lands, and 2 acre-feet for its grazing lands. Much testimony has been adduced also, not a little of it of a scientific nature, on this subject, which it would require much space in the opinion to analyze. The Land & Stock Company insists that the duty of water should still be measured by the old method of irrigation of pasture and the native grasses for the production of hay, which was by the flooding system, that allowed the water to cover the surface of the soil, and actually to remain thereon for considerable periods of time. This method is being disapproved of in more recent years as wasteful and not an economical use. No person is entitled to more water than he is able to apply to a reasonable and economical use. True, it may be that good results are obtainable

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from the former method, but that does not augur that just as good results may not be secured by a much more moderate use, which would leave a large quantity of water for others, who need it as much as the Land & Stock Company. Whoever is first in time, however, is entitled to sufficient for his reasonable needs. We are impressed that the award made this defendant is amply sufficient for its needs, considering the acreage subject to irrigation and the dates of its several appropriations. In the Twin Falls Salmon River Case, 245 Fed. 9, 157 C. C. A. 305 (No. 2885), which we are deciding with this, we are approving an award of 3 acre-feet for the irrigation of hay and grain land, and 1½ acre-feet for pasture lands, and, for a further discussion of the subject, reference is made thereto.

[8] Defendant Land & Stock Company also excepts to the allowance by the court to plaintiffs of any quantity of water in excess of 30,000 acre-feet, upon the basis that there were under irrigation in 1915 but 20,000 acres, and that the duty of water for this acreage is 1½ acre-feet per acre as prescribed by the new plan of the Twin Falls Oakley project. Defendants also complain of the allowance to plaintiffs at the rate of 2¾ acre-feet per acre in view of the duty of water assigned under the new plan. Account must be taken of the fact that the 1½ acre-feet under the new plan is to be delivered at a point within one half-mile of the place of intended use, which, of course, leaves out of view seepage from the reservoir and canals, and evaporation. Inquiry relative to this latter subject, plaintiffs' counsel say, was not gone into because of the "obvious insufficiency of the water supply to cover the entire tract for which the works were built." The fact appears from the record that the total discharge from Goose creek and its tributaries into the reservoir was: For 1911, 49,170 acre-feet; for 1912, 74,000 acre-feet; for 1913, 50,915 acre-feet; for 1914, 64,740 acre-feet.

All this water was regularly used on the area which was then in cultivation under the project. So that no water has been allowed to go to waste, and there has at no time been any surplus water which the Land & Stock Company would be entitled to for use by reason of its deferred appropriation.

The plaintiffs' project contemplates the irrigation of 50,000 acres, and they are entitled to their appropriations sufficient for the purpose. The court, however, has dealt with a theory, and not a condition, and this presumably because of the fact that all the waters of Goose creek and its tributaries were being employed for a useful purpose. Nor can it be anticipated that the quantity to be had from the source specified will ever be sufficient to supply the reasonable needs of plaintiffs under their project, even at the rate of 1½ acre-feet to the acre. But, as we say in case No. 2885:

> "Under a project like this, ten years is allowed within which to make the diversion and proof thereof for a beneficial use. The appropriation is contingent upon the use, of course, but in the larger projects the appropriation speaks as of the date of the license, though, if not applied to a beneficial use within ten years, it lapses. In the meantime no one will be deprived of the use of the water not reduced to a beneficial use under the project."

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See Idaho Sess. Laws 1915, p. 216.

We find no reason for modifying the decree in pursuance of the exception.

The next error assigned is in respect to the provisions of the decree "intended to operate upon property and rights and to regulate the internal affairs of appellant in a foreign state." This subject has been fully treated of in case No. 2885, and what is said there has pertinent application here.

[9, 10] The question pertaining to interstate waters is also disposed of in case No. 2885. This has direct bearing on the controversy presented by the amendment to the answer, that there is a defect of parties. The purpose of the suit is to quiet title to plaintiffs' water rights in Idaho. The court is without jurisdiction to settle water rights in Nevada. No complaint is made that parties other than the defendants are attempting to interfere with plaintiffs' acquired water rights in Idaho, and there can be no cause for injunction against others than the defendants until attempted interference is shown. If there are any others who have rights superior to plaintiffs' not parties to the suit, of course their rights cannot be precluded by the decree herein. They may yet assert such rights, but they are not necessary parties to this suit, not having attempted to assert them to the impairment of plaintiffs' contention.

[11] Another assignment is that the cause should be dismissed as to the Utah Construction Company. It appears that such company is the owner of a large proportion of the stock of the Land & Stock Company, and is in a position to control its action, and might attempt to do so. For this reason, it is at least a proper party to the suit.

Decree affirmed.

(245 Fed. 35)

McPHERSON et al. v. UNITED STATES et al.

(Circuit Court of Appeals, Sixth Circuit. August 1, 1917.)

No. 2867.

1. APPEAL AND ERROR ⟹4—PROPER MODE OF REVIEW.

An order entered in a suit in equity brought by a receiver, vacating a previous order made on settlement of a compromise decree allowing fees to counsel for the receiver, *held* properly reviewable by appeal.

2. RECEIVERS ⟹96—APPOINTMENT OF COUNSEL—RECEIVER FOR COLLECTION OF ASSETS.

The general rule that a receiver should not employ counsel of either party is limited to cases of adverse interest, and has no application to a case in which a receiver is appointed, in accordance with the prayer of the bill, to recover property fraudulently conveyed by the defendant.

3. RECEIVERS ⟹96—UNITED STATES ATTORNEY—APPOINTMENT AS COUNSEL FOR RECEIVER.

The United States brought a suit in equity against a corporation, alleging that it had defrauded the government of internal revenue taxes, that it was insolvent, that its assets had been converted by stockholders, and praying for a receiver to recover such assets, and such receiver was appointed. *Held*, that there was no impropriety in the appointment by

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the court of the district attorney and assistant district attorney, who had brought the suit as counsel for the receiver, to bring suits against the stockholders.

4. DISTRICT AND PROSECUTING ATTORNEYS ⟹6(1)—UNITED STATES ATTORNEY —RIGHT TO ACCEPT PRIVATE COMPENSATION—"CIVIL ACTIONS IN WHICH THE UNITED STATES ARE CONCERNED."

In a suit by the United States against a corporation, charged with having defrauded the government of internal revenue taxes, a receiver was appointed to recover money alleged to have been fraudulently converted by stockholders, and the district attorney and his assistant were appointed as his counsel. A suit was brought by the receiver against the stockholders, which was compromised and settled, the costs to be paid by defendants. On entry of the decree the court allowed a counsel fee to the receiver's attorneys, which was paid by the defendants. Criminal prosecutions for the fraud were also pending against certain of the defendants. *Held*, that the receiver's suit was ancillary to the main suit, and within Rev. St. § 771 (Comp. St. 1916, § 1296), which makes it the duty of the district attorney to prosecute "all civil actions in which the United States are concerned," and that it would have been the official duty of the district attorney to conduct the suit, if requested by the Attorney General; that the fact that the appointment was made by the court without such request was immaterial, as it was known to the Attorney General, and the district attorney and his assistant were treated by him and the court throughout as representing the government, as they in fact did; and that it was contrary to public policy to permit them to receive private compensation, although paid by defendants for the performance of an official duty, at least without the consent of the Attorney General, and especially in view of the pending criminal prosecutions.

In Error to, and Appeal from, the District Court of the United States for the Southern District of Ohio; John E. Sater, Judge.

Ancillary suit by Edward L. Taylor, Jr., as receiver, against Dennis Kelly and others. Sherman T. McPherson and Harley E. Burns appeal from an order entered on motion of the Attorney General of the United States. Affirmed.

Lawrence Maxwell and Edward P. Moulinier, both of Cincinnati, Ohio, for plaintiffs in error and appellants.

Stuart R. Bolin, U. S. Atty., of Columbus, Ohio, for defendants in error and appellees.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. On April 10, 1915, the United States filed its amended bill in equity in the court below, alleging that the Capital City Dairy Company, of Columbus, Ohio, had defrauded the government out of large sums of money in connection with the manufacture and sale of artificially colored oleomargarine, through the payment of a tax of only one-quarter of a cent per pound applicable to the uncolored product, instead of 10 cents per pound to which artificially colored oleomargarine was subject; further alleging due estimate, assessment, and levy against the Dairy Company of a tax of more than $2,000,000 on account of those frauds, and the lien of the United States thereunder on all the Dairy Company's property, the sale under the levy of all that company's tangible property (leaving more than

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$1,800,000 still unpaid), the conversion by stockholders of the company's assets through the receipt of dividends not paid out of profits, the company's abandonment of its business, its insolvency, and its lack of assets except the sums misappropriated by stockholders; and praying for the appointment of a receiver, with authority to collect from stockholders the sums so misappropriated, and to apply the same toward the payment of the remaining lien of the United States. (The original bill had been filed February 5, 1915.)

The appellants McPherson and Burns, who were then respectively United States Attorney and Assistant United States Attorney for the Southern district of Ohio, signed the bill as solicitors for plaintiff. Nine days later Edward L. Taylor, Jr., was duly appointed receiver of the Dairy Company's assets, with authority to recover all property interests of the Dairy Company, and Messrs. McPherson and Burns were, on the court's own motion, designated as counsel for the receiver, "on account of the knowledge possessed by [them] of the matters affecting the defendant, its officers and stockholders." Two days later the receiver, under special leave granted, filed through appellants, as his solicitors and counsel, his bill against several stockholders of the Dairy Company, including Dennis Kelly, as well as representatives of the estates of two deceased stockholders and the wife of Dennis Kelly, to recover (and apply to the debt of the United States) corporate moneys fraudulently misappropriated and concealed.

In September, previous to the filing of the original bill for receivership, several of the defendants had been indicted in the District Court below on account of the frauds involved in the receivership suit. The indictments were still pending, and appellants were actively connected with the prosecutions, under direction of a special assistant to the Attorney General, and expected to take part in the trials which were soon to occur.

On April 28, 1915, seven days after the receiver's bill against the stockholders was filed, an offer of $400,000, made by the defendants other than the Pirrung estate, in settlement of the civil liability of all defendants except that estate, was accepted by the Attorney General, the defendants in that connection to pay the costs. This offer and this settlement were made and discussed at a conference in the office of the Commissioner of Internal Revenue, at which were present the Commissioner, his solicitor, the collector of internal revenue for the Southern district of Ohio, the receiver of the Dairy Company, Mr. Herron of the Attorney General's staff, the appellant McPherson, United States Attorney and solicitor for the receiver, and two counsel for the compromising defendants, as well as another official representing the government. Nine days after this conference and compromise, the various defendants involved filed a formal answer to the receiver's bill, and on the same day the receiver reported to the court and recommended the acceptance of the offer of "$400,000, and costs herein to this date, taxable against the last above named defendants, said costs to include such compensation for the receiver herein and fees for his attorneys as this court may order and direct to be paid." The receiver's recommendation was approved by the court, and on the following day

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(May 8th) the court fixed the receiver's compensation at $20,000, and that of the appellants, as attorneys for the receiver, at $20,000 in the aggregate. These two items of compensation were immediately paid by the defendants, in connection with the payment of the first installment of the compromise payment.

On June 1st the Attorney General moved to vacate the allowance to both the receiver and his counsel, whereupon each of the three persons concerned placed in the hands of the court the amount of the fee awarded and paid him, and expressed in writing his willingness that the court reconsider its allowance of fees and make such order as the facts might warrant.

The principal grounds of the Attorney General's motion (so far as counsel fees are concerned) were that appellants' service in question was an official service in an action to enforce a civil liability to the United States, for which compensation other than the official salary is forbidden; that the settlement involved the compromise of an alleged violation of the internal revenue laws, for which United States attorneys are forbidden to receive compensation; that appellants' relations to the pending criminal cases made such payment of counsel fees improper; that the order for payment was made without previous notice to the United States; and that the compensation allowed appellants was grossly excessive. The Attorney General also asked the annulment of the original designation of appellants as counsel for the receiver, for the reason that the action in which the receiver was appointed was begun by appellants as attorneys for the United States as plaintiffs, and that accordingly their appointment as attorneys for the receiver was improper.

[1] Hearing was at once had upon the Attorney General's motion, and resulted in an opinion by the District Judge that appellants were, in the prosecution of the receiver's suit, acting in their official capacity as United States Attorney and Assistant United States Attorney respectively, and so were not entitled to receive compensation other than their official salaries; also that the Attorney General had not consented to the payment of such compensation. The United States thereupon disclaiming right to the $20,000 paid appellants, and Daniel Kelly then applying for the same, the amount was returned to him, on his giving bond to pay appellants so much of the $20,000 as might thereafter be allowed to one or both of them. The question of the receiver's compensation was reserved by the court. Its order denying compensation to Messrs. McPherson and Burns is before us for review, both on appeal and writ of error. We think appeal the proper remedy, and the writ of error will be dismissed.

A further statement of facts will assist in an understanding of the controversy: On April 20, 1915, the day before the receiver's bill was actually filed, the Commissioner of Internal Revenue and the Attorney General were advised by appellant McPherson of the appointment of himself and appellant Burns as attorneys for the receiver; it appears that at the compromise conference in the Commissioner's office, when appellant McPherson stated that he would leave his fees to the court, Mr. Herron said that he (McPherson) "could not get anything for what

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he had done prior to his appointment as attorney for the receiver"; that Mr. McPherson replied, "Of course not," and that Mr. Herron then said, "Oh, well then, why talk about that?" and in his affidavit he states:

"Undoubtedly I gave the impression to the attorneys for the defendants that in the settlement the matter of attorney's fees were not an item to be seriously considered, and undoubtedly Mr. Taylor, in his statement as to the court's fixing his fee, left the same impression on the minds of those present."

Mr. Herron, appellant McPherson, and Receiver Taylor, after the compromise was arrived at, went to the office of Assistant Attorney General Wallace, to whom the proposition was presented. Mr. Wallace then went to Attorney General Gregory, and received his approval of the compromise, which was reported back by Mr. Wallace to Messrs. Herron, McPherson, and Taylor. Mr. McPherson says expressly (and Mr. Taylor by apparently permissible implication) that Assistant Attorney General Wallace was informed of the agreement respecting fees of receiver's counsel. Mr. Wallace expressly denies this, and Mr. Herron says he has no recollection of anything being said at either conference with Mr. Wallace about receiver's fees or attorney's fees, and is "confident they were not mentioned." Without questioning the good faith of Messrs. Taylor and McPherson, we cannot doubt that Mr. Wallace did not understand that feature of the situation, and had no idea that appellants were to receive any compensation for their services, except as included in their official salaries, and that had he so understood, he would not have assented to it; and it is clear that Attorney General Gregory was not advised of that feature. From what was said, however, at the conference first mentioned, and from the subsequent announcement of the compromise offer, we are convinced that appellants and the receiver, as well as defendants' counsel, understood (though, as it turned out, mistakenly) that the Department of Justice had consented that the costs to be paid should include the receiver's compensation as well as that of his counsel for services rendered after, but not before, the receiver was appointed, to be fixed by the court; and Mr. Herron's statement confirms the naturalness of such understanding.[1] Acting on this understanding, the attorneys for defendants, together with the receiver and appellants, agreed between themselves that none of them should make any suggestion to the court as to the amount of either receiver's or attorney's fees; and in the order which was drafted by the participation of all the counsel concerned blanks for the items of compensation were left to be

[1] Mr. Herron's affidavit states that it was understood that "the receiver was to be allowed by the court what his services justified, and that Mr. McPherson should receive the ordinary pay of an attorney for what he had done since his appointment as attorney for the receiver, but I did not think the matter was worth mentioning, and I am sure that no one spoke of it. I had given no thought to the impropriety of Mr. McPherson getting any compensation at all, feeling that he had done a great deal of valuable and unique work for the government, was a great factor in making the settlement, and therefore might well have an extra allowance made to him. I understood, however, that that allowance must be based on what he had done since he was appointed attorney for the receiver."

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filled in by the court. It is conceded on all hands that defendants' attorneys, as well as Messrs. McPherson and Taylor, observed that agreement. It appears, however, that appellant Burns, on being applied to by a person supposedly in Kelly's interest for information (in connection with the raising of the money required to carry out the compromise) as to the amount of the receiver's compensation, attorney's fees, and costs which Kelly would probably be called upon to pay, stated that it would be impossible for him to give an idea upon that subject, but that, if the court asked for suggestions as to the amount of such fees, he would say that "a fair and reasonable fee would be 5 per cent. of the amount agreed upon in settlement to the attorneys and 5 per cent, to the receiver." Appellant Burns disclosed to Judge Sater the fact of this interview. Judge Sater, in his opinion, states in substance that in appointing appellants as counsel for the receiver he did not expect that they would receive compensation, other than their regular salaries, unless they should be continued as attorneys after their terms of office expired, and then only for services thereafter rendered, and that "trustworthy persons inform me, and the evidence conclusively shows, that it was announced by me at one of the hearings that he was not otherwise to be paid";[2] that appellant Burns, in relating his conversation with Kelly's representative, stated that the latter said that the amount suggested (5 per cent. to the attorneys and 5 per cent. to the receiver) "was about right and would be satisfactory"; and that appellants' compensation was fixed in the belief that the Attorney General had assented to the payment of compensation and that the defendants were satisfied with the amount which the court fixed. The compensation was fixed by filling in the blanks in the order drafted by counsel.

It is undisputed that appellant McPherson, as well as the receiver and defendants' counsel, were ignorant of Burns' statement to the court. It should be said that Burns made his disclosure to the District Judge on being told that the "court could not act intelligently without information," and that he denies telling Judge Sater that defendants or their counsel had expressed themselves as satisfied to pay the attorneys $20,000. The fact, however, that Kelly's supposed representative made no objection to Burns' statement of his attitude, would naturally tend to raise at least an inference of his acquiescence. There is no doubt that the sum allowed was highly extravagant compensation for services rendered, at least after the appointment of the receiver.

1. Appellants challenge the right of the United States to intervene by motion to vacate the award of compensation. We have no doubt,

[2] The affidavit of one of defendants' counsel states that in the conference between appellants, the receiver and defendants' counsel, in connection with the settling of the entry of appointment, Judge Sater said, in substance: "Of course Mr. McPherson and Mr. Burns will not be entitled to receive any compensation while they occupy their present positions, they shall continue as counsel for the receiver while they occupy their present official positions, but my intention is that, if this litigation be pending when they cease to occupy their present positions, they shall continue as counsel for the receiver, and, in that event, they would be entitled to reasonable compensation for services rendered by them after that time." This statement was not, upon the hearing below (so far as shown by the record), denied by any one. The brief of counsel in this court, however, contains such denial.

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however, that the Department of Justice, which represents the government of the United States, has a very proper interest in seeing to it that the rights of litigants in cases to which the government is a party are in every way respected, and that the officers of the department are not remiss in their duty, and is especially interested in those regards when criminal proceedings are pending, as here. We see no element of estoppel against the United States to complain. But, more than this, the court which appointed the receiver and his counsel, and awarded compensation, clearly had the right, upon its own motion or at the instance of a party to the suit, to reconsider its action in that regard. However, all question of jurisdiction to so reconsider is foreclosed by appellants' consent thereto.

The important and meritorious questions are: First, whether appellants were eligible to appointment as counsel for the receiver; and, second, whether they could lawfully receive any compensation whatever as such counsel.[3]

[2, 3] 2. Questions of compensation apart, the mere fact that appellants were counsel for the United States in the original suit filed in its name did not make their appointment as counsel for the receiver necessarily improper. The general rule that a receiver should not employ counsel of either party is limited to cases of adverse interest (In re Smith [C. C. A. 6] 203 Fed. 369, 372, 121 C. C. A. 485; Alderson on Receivers, § 233), and has no application to proceedings, such as taken here, to recover property fraudulently conveyed. Appellants' representation of the receiver in the ancillary suit involved no necessary conflict of interest between the United States and the receiver (High on Receivers [4th Ed.] § 217, pp. 259, 260; Daniel v. Insurance Co. 149 Mich. 626, 629, 113 N. W. 17). Should counsel's duty to the United States and to the receiver be in actual experience found to conflict, the receiver should, of course, employ other counsel. Nor (still apart from questions of compensation) did the fact that appellants were respectively United States Attorney and Assistant United States Attorney disqualify them from acting as counsel for the receiver in the prosecution of the suit to recover from stockholders. The receiver's action in that regard was merely ancillary to, and in effect a continuation of, the original suit for the appointment of a receiver. The United States was the party beneficially interested; and there was, in our opinion, no more impropriety in appellants representing the receiver, so far as concerns the prosecution of the suit to reach specific assets for the benefit of the United States, than in filing the original bill for the receivership had for the purpose of such suit. Indeed, as we shall see, it was appellants' duty, as between themselves and the United States, to represent the interests of the United States therein, so far as the government should request.

[4] 3. The more important question concerns appellants' right to compensation for the services rendered. As we have already said, we have no doubt that it would have been the duty of appellants to repre-

[3] It is assumed by all parties that, if appellants are entitled to any compensation, the case will be remanded to the District Court for hearing as to amount.

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sent the United States in the receiver's suit, if requested by the government, and without compensation other than their official salaries. The original bill was in effect as well as in name that of the United States, and showed on its face that it was filed by direction of the Attorney General, and by authority and sanction of the Commissioner of Internal Revenue. The United States Attorneys represented the plaintiff therein, as was made their duty, not only by section 838 of the Revised Statutes (Comp. St. 1916, § 1297), which relates to revenue fraud cases, but by section 771 (section 1296), which makes it the duty of every district attorney to prosecute in his district "all civil actions in which the United States are concerned." The receiver's bill was, as already said, purely an ancillary or dependent proceeding,[4] throughout which the United States was treated as the sole beneficiary, as in fact it turned out to be. It is unnecessary to decide whether this ancillary proceeding should be classified as a revenue fraud case, under section 838, for we think it clear that it was a "civil action in which the United States are concerned," within the meaning of section 771, which is not limited to cases in which the United States is a party of record. In Smith v. United States, 158 U. S. 346, 353, 15 Sup. Ct. 846, 848, 39 L. Ed. 1011, it is said:

"By section 771 it is not only the duty of the district attorney to prosecute all delinquents for crimes and offenses against the federal laws, but 'all civil actions in which the United States are concerned,' and there is a finding that the claimant was not only directed by the Attorney General to appear, but that the government was interested either in the prosecution or defense of such suits, *although the direct nature of such interests does not fully appear.*"

And again (158 U. S. 355, 15 Sup. Ct. 849, 39 L. Ed. 1011):

"It can hardly be supposed that Congress could have intended that the Attorney General should not be at liberty to call upon the official representative of the United States in each district to defend, as a part of his official duty, the interests of the government, in *any suit in which it was interested.*" (Italics ours.)

In Hillborn v. United States, 163 U. S. 342, 345, 16 Sup. Ct. 1017, 1018, 41 L. Ed. 183, the doctrine of Smith v. United States was reaffirmed, to the extent that the words—

"'prosecute all civil actions' were not to be interpreted in any technical sense, but should be construed as covering any case in which the district attorneys are employed to prosecute the interests of the government, whether such interests be the subject of attack or defense."

In United States v. Ady (C. C. A. 8) 76 Fed. 359, 22 C. C. A. 223, a district attorney was held not entitled to extra compensation for services rendered by direction of the Attorney General for defending officers of the army in suits against them for acts done in the line of their duties.

While appellants were not directed by the Attorney General to appear in the receiver's suit as attorneys for that officer, and while it

[4] See White v. Ewing, 159 U. S. 36, 15 Sup. Ct. 1018, 40 L. Ed. 67; Compton v. Jesup (C. C. A. 6) 68 Fed. 263, 279, 15 C. C. A. 397, and cases cited; Robertson v. Conway (C. C. A. 6) 188 Fed. 579, 584, 110 C. C. A. 377; Cobb v. Sertic (C. C. A. 6) 218 Fed. 320, 134 C. C. A. 116, and cases cited.

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would have been entirely competent for the receiver to employ wholly disinterested counsel, we think appellants were throughout the litigation recognized by the court, the receiver and the Department of Justice as representing the United States. The department was, at the time the bill was filed, notified that the court had appointed appellants as attorneys for the receiver; it continuously treated appellants, both by correspondence and by personal interviews with appellant McPherson, as representing the interests of the United States in that suit. The dominating character of appellants' relations toward the receiver's suit and its compromise was that of attorneys for the United States. As was well said by Judge Sater:

> "The receiver was appointed to collect, if possible, the government's claim. The circumstances were such that the district attorney could not aid the receiver without acting for the United States. In the performance of his duty he could of course avail himself of the services of his assistants, but the purpose in his appointment was, as heretofore stated, to secure as far as possible his individual attention to the case."

Both appellants had, in December preceding the filing of the government's original bill, attended a conference in the office of the Commissioner of Internal Revenue, in which procedure for recovery from stockholders was considered. Such proceeding was naturally a part of the government's plan when its bill was filed, and one or both of appellants had presumably been actively considering the subject prior to their appointment as counsel for the receiver. The arrangements for the compromise conference, including appellant McPherson's call to Washington for the purpose, were official in form. The Attorney General alone, on the part of the plaintiff in that suit, determined whether the proposition of compromise should be accepted. The order confirming the compromise directed the payment to the collector of internal revenue of the entire sum of $400,000 recovered, and the receiver paid directly to that officer the cash paid down on the compromise, as well as the avails of the note maturing June 1st thereafter.

Without deciding that the district attorney may not properly receive compensation for representing a receiver in the prosecution of a creditors' suit in which there are substantial beneficiaries aside from the United States, or that an attorney for the United States, as counsel for a receiver in a suit in which the United States is interested, may in no case, even by express consent of the government, receive from a defendant, under a compromise of litigation, compensation for special and unusual services, although rendered to the United States as the sole party beneficially interested (on which questions we express no opinion), it is plain to our minds that under the circumstances existing here such recovery was not permissible, at least in the absence of such consent. It is immaterial that the fees in question were paid by defendants, rather than out of the fund recovered. Recovery of such fees from a defendant, if had without the government's consent, would naturally belong to the United States. As said by the late Judge Thayer:

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"The law does not allow an attorney to stipulate with an opposing party for the payment of his fees, in whole or in part, unless he acts with the knowledge and consent of his client." Bliss v. United States (C. C.) 37 Fed. 191, 195.

And, as said by Judge (later Mr. Justice) Brewer, in affirming the judgment in that case:

"Public policy requires the strictest adherence to the rule that when a counsel receives from the defendant in a case in which he is prosecuting money above the fees which by law he is entitled to, the money which is received belongs to his client." Bliss v. United States (C. C.) 38 Fed. 230.

The principles so stated apply with equal force under the existing statute, which provides salaries to the United States Attorneys for the district in question in full for official services. Act May 28, 1896, c. 252, §§ 6, 7, 29 Stat. 179, 180 (Comp. St. 1916, §§ 1418, 1419). We think recovery by appellants for services in effect rendered the United States forbidden by sound public policy, under the circumstances presented here, including the facts that the United States were the only beneficiaries, the reason for appellants' appointment as already stated, the intention of the court (whether communicated or not) that appellants should receive no compensation while holding their official positions, the actual relations between appellants and the government toward the litigation and in the effecting of the compromise, the fact of the pendency of the criminal cases and appellants' relations thereto, lack of authoritative consent on the part of the United States to such recovery, and the fact that the United States were not represented in the making of the actual order allowing compensation.

We think public policy, as declared by the statutes and the decisions of the courts of the United States, opposed generally to the receipt by United States Attorneys of private compensation for the performance of statutory duties. Previous to the act of 1896 (29 Stat. 179, supra), providing a salary in full for official services, the Supreme Court, in Gibson v. Peters, 150 U. S. 342, 347, 14 Sup. Ct. 134, 136, 37 L. Ed. 1104, in denying recovery by a United States district attorney for services rendered to the receiver of a national bank, said:

"Nor can the expenses of the receivership be held to include compensation to the district attorney for conducting a suit in which the receiver is a party, for the obvious reason that the statute does not expressly provide compensation for such services. Congress evidently intended to require the performance by a district attorney of all the duties imposed upon him by law, without any other remuneration than that coming from his salary, from compensation or fees authorized to be taxed and allowed, and from such other compensation as is expressly allowed by law specifically on account of the services named."

This proposition was reaffirmed in United States v. Johnson, 173 U. S. 363, 372, 19 Sup. Ct. 427, 43 L. Ed. 731 et seq. And see Garter v. United States, 31 Ct. Cl. 344. The force of these decisions is strengthened, rather than impaired, by the act of 1896. Except as indicating the policy of the law, we attach no special importance to section 3170 of the Revised Statutes (Comp. St. 1916, § 5893), which makes it an offense for a district attorney to receive anything for compromising a violation of the internal revenue laws (assuming that the compromise in question was a revenue law violation) or to section 18 of the act of

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1896, just cited (Comp. St. 1916, § 1430), which penalizes the acceptance by United States Attorneys of illegal fees. The fees in question were paid under judicial order allowing compensation, obtained in the evident belief that the government and all parties concerned had assented thereto. But as indicating the spirit of the laws the sections referred to are pertinent.

State statutes fixing compensation for the official services of a public prosecutor have been held to forbid the recovery of additional compensation for services which it was his official duty to perform—not only from third persons, and in pursuance of express contract therefor (Coggeshall v. Conner, 31 Okl. 113, 120 Pac. 559, 39 L. R. A. [N. S.] 81, Ann. Cas. 1913D, 577), but from the county, even where the services were rendered under express agreement to pay therefor (McHenderson v. Anderson County, 105 Tenn. 591, 59 S. W. 1016; Money v. Beard, 136 Ky. 219, 124 S. W. 282). In the Coggeshall Case it was said (31 Okl. 115, 120 Pac. 560, 39 L. R. A. [N. S.] 81, Ann. Cas. 1913D, 577):

> "It is against public policy for a public officer to be allowed private compensation for the performance of any duty as a public officer."

In the Anderson County Case it was said:

> "It cannot alter the rule of law as to either of these officials that the value of their services was far beyond the compensation provided by statute. * * * Public office is taken and held with the emoluments and burdens which the law imposes, and the burdens are or may be far beyond the compensation allowed in many cases. But this gives no valid claim for additional compensation."

In Wilson v. Otoe County, 71 Neb. 435, 98 N. W. 1050, the prohibition against recovery of extra compensation is held to extend even to extraofficial services. And see Railroad Co. v. Lee, 37 Ohio St. 479.

The pendency of the criminal cases, and appellants' relations toward them, to our minds give special emphasis to the rule of public policy invoked.

In our opinion United States v. Mormon Church, 6 Utah, 9, 44, 21 Pac. 503, 524, et seq., is distinguished from the instant case, not only because of the later statute of 1896, providing for compensation by salary alone, but because of the prominent features of this case not found in the Church Case.

It follows that, at least in the absence of the consent of the United States, appellants could not lawfully retain the compensation in question; and it was at least incumbent upon them to show that such consent was given. This burden has not been sustained, for not only is there no direct proof that Mr. Herron was authorized to agree on the terms of the compromise, but the implications from the testimony are the other way. The order setting aside the award of compensation for services rendered in the prosecution of the receiver's suit was therefore rightly made.

No question of appellants' right to compensation for services rendered the receiver personally, as distinguished from services rendered for the benefit of the United States, is presented; for it does not appear

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that appellants rendered any substantial services to the receiver unless as incidental to, or involved in, the services rendered the United States.

The order vacating the award of compensation is accordingly affirmed.

(245 Fed. 46)

JESSON et al. v. NOYES.

(Circuit Court of Appeals, Ninth Circuit. August 20, 1917. Rehearing Denied October 8, 1917.)

No. 2528.

1. EQUITY ⟹148(1)—JOINDER OF CAUSES OF ACTION.
   The court, under Alaska statute as to joinder of causes of action, had discretion to permit the joinder of causes of action for diminishing the assets of the bank by permitting subscribers to surrender stock and for declaring an illegal dividend.
2. BANKS AND BANKING ⟹77(6)—UNLAWFUL ACTS OF OFFICERS—COMPLAINT.
   In a suit by the receiver of an insolvent bank against former directors and officers to recover assets illegally diverted, a complaint alleging that the dividend was wrongfully, unlawfully, and fraudulently declared and paid, setting forth facts to sustain the allegation, and alleging facts to show that the money paid out for the surrender of stock certificates was fraudulently and illegally paid out of the capital of the corporation, stated a cause of action at common law.
3. EVIDENCE ⟹35—JUDICIAL NOTICE—STATE STATUTE.
   The District Court of Alaska may take judicial notice of the statutes of a state.
4. BANKS AND BANKING ⟹91—PURCHASE OF CAPITAL STOCK BY BANK.
   Under Corporation Act of Nevada (Laws 1903, c. 88) § 68, Rev. Laws, § 1169, providing that it shall not be lawful for the trustees or directors to divide or withdraw, or in any way pay to the stockholders, any part of the capital stock of the company, nor reduce the capital stock, unless in the manner prescribed, it was illegal for the bank to purchase at par value its stock from stockholders, and pay therefor out of the capital, and not the surplus, of the bank.
5. BANKS AND BANKING ⟹77(6)—ILLEGAL PURCHASE OF STOCK—ASSETS—SUFFICIENCY.
   In a suit to hold the directors of a bank liable for an illegal purchase for the bank of its stock, evidence *held* to support a finding that the directors had knowledge of the purchase.
6. BANKS AND BANKING ⟹77(4)—ILLEGAL TRANSACTIONS—RECOVERY—SUBSEQUENT CREDITORS.
   Where, contrary to statute and not in good faith, the directors of a bank declared dividends out of its capital, and purchased for the bank its stock, the diverted funds may be recovered for subsequent creditors of the bank, in a suit against the directors and the sellers of the stock.
7. ACCORD AND SATISFACTION ⟹26(3)—EVIDENCE—SUFFICIENCY.
   In a suit against former directors and officers of a bank, evidence *held* insufficient to show that certain deeds were accepted by the receiver from an ex-president in accord and satisfaction of the claims against the president, or any of the defendants.
8. ACCORD AND SATISFACTION ⟹1—ELEMENTS.
   Accord and satisfaction requires an agreement, and must finally and definitely close the matter covered by it.

Appeal from the District Court of the United States for the Fourth Division of the Territory of Alaska; F. E. Fuller, District Judge.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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Suit by F. G. Noyes, as receiver of the Washington-Alaska Bank, a corporation, against John A. Jesson and others. Decree for complainant, and defendants appeal. No error. Decree affirmed.

The appellee, as receiver of an insolvent bank, brought suit against the appellants, who had been the directors and officers of the bank, charging them with wrongful and negligent acts and conduct whereby the bank had been injured and its assets wasted, so that it became unable to pay its creditors, praying that an accounting be had and judgments rendered against the appellants for the amounts found to be due from them respectively. On January 21, 1908, the Fairbanks Banking Company, a corporation organized under the laws of the state of Nevada, began business at Fairbanks, Alaska. On September 14, 1910, the name of the corporation was changed to Washington-Alaska Bank. On January 5, 1911, receivers were appointed to take over the assets of the corporation and wind up its business. The court below found that certain of the appellants unlawfully diminished the assets and capital stock of the corporation, by permitting subscribers to surrender stock certificates which had been issued to them, and paying them the amount of their subscriptions, and that on April 12, 1910, the appellants Wood, McGinn, Brumbaugh, and Jesson declared a dividend upon the outstanding capital stock, at a time when the corporation had no undivided profits or surplus in excess of its liabilities, but was insolvent.

The findings of the court as to the surrender of the stock are in substance as follows: That, when stock was taken back by the corporation, the amount paid therefor was either paid in cash, or the notes held by the bank therefor were canceled and surrendered to the stockholders; that the bank had no surplus or undivided profits against which the same could be charged; that the taking back of said stock and such payment therefor was illegal and wrongful, and in violation of the laws of the state of Nevada, under which the corporation was organized; and that said stock surrenders were acquiesced in by said directors and in some instances were made under their direction and with their express approval.

As to the unlawful declaring of the dividend, the court found in substance as follows: That on April 12, 1910, the Fairbanks Banking Company, by its board of directors, declared a dividend of 20 per cent. on its then outstanding capital stock of $168,600, which dividend amounted to $33,720, and was paid to the stockholders of the bank, either in cash or by crediting the amount thereof upon notes due by the stockholders to the bank; that at that time the said Fairbanks Banking Company had no surplus or undivided profits out of which the dividend could be declared and paid, and said dividend was declared and paid in violation of the laws of the state of Nevada, and also in violation of the by-laws of the corporation, and was wrongful and illegal; that at the time when the dividend was declared and paid the appellants Wood, McGinn, Brumbaugh, and Jesson were members of the board of directors of said Fairbanks Banking Company, and gave their consent thereto.

By the decree it was adjudged that the appellee recover of and from the appellants Wood, McGinn, Brumbaugh, and Jesson, jointly and severally, the sum of $33,720; that he recover from the appellant J. A. Jesson the further sum of $13,400, by reason of the surrender of shares of capital stock made between July 13, 1908, and September 12, 1908; that he recover from the appellants Jesson and Hill, jointly and severally, the further sum of $1,500, by reason of the surrender of shares of capital stock between September 13, 1908, and October 13, 1908; that he recover from the appellants Jesson, Hill, and Peoples, jointly and severally, the further sum of $1,100, by reason of the surrender of shares of capital stock made between October 14, 1908, and March 13, 1909; that he recover from the appellants Jesson, Hill, and Brumbaugh, jointly and severally, the further sum of $1,000, by reason of the surrender of shares of capital stock made between March 14, 1909, and September 12, 1909; that he recover from the appellants Jesson, Brumbaugh, and McGinn, jointly and severally, the further sum of $3,000, by reason of the surrender of the capital stock made between September 13, 1909, and October 12, 1909; and that he recover from the appellants Jesson, McGinn, and Brumbaugh,

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jointly and severally, the further sum of $1,000, by reason of the surrender of shares of the capital stock made between October 13, 1909, and January 18, 1910.

McGowan & Clark, A. R. Heilig, and John L. McGinn, all of Fairbanks, Alaska (Metson, Drew & Mackenzie, Curtis Hillyer, and Charles J. Heggerty, all of San Francisco, Cal., of counsel), for appellants.

O. L. Rider, of St. Louis, Mo., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] It is assigned as error that the court below overruled the demurrers which the appellants interposed to the amended complaint, on the ground that several causes of action had been improperly united therein. The statute of Alaska, concerning the joinder of causes of action, is identical with and is taken from the statute of Oregon, and before it was adopted for Alaska it had been construed by the Supreme Court of Oregon in Benson v. Keller, 37 Or. 120, 60 Pac. 918. In that case it was the opinion of the court that much must be left to the discretion of the court in determining whether a bill is multifarious. The court said that the objection of multifariousness—

"does not go to the merits of the cause, but relates more nearly to a question of convenience in conducting the suit; and, in large measure, it simply calls for an exercise of discretion in deciding whether both or all the causes of suit set forth in the bill shall be tried in a single suit, or be split up, and the parties be relegated to the bringing of two or more suits for the accomplishment of their purposes, or whether the defendant who is a necessary party in respect of one or more matters suggested by the complaint has a sufficient interest in or connection with the other matters involved to make him a proper party in respect to such other matters."

The court considered that the object of the rule against multifariousness is to protect the defendant from unnecessary expense; that the demurrer for multifariousness does not go to the merits of the controversy. but calls upon the plaintiff to go out of court and split up his demands and begin anew; and the court quoted from Lehigh Val. R. R. Co. v. McFarlan, 31 N. J. Eq. 706, 758:

"The rule with regard to multifariousness, whether arising from the misjoinder of causes of action or of defendants therein, is not an inflexible rule of practice or procedure, but is a rule founded in general convenience, which rests upon a consideration of what will best promote the administration of justice, without multiplying unnecessary litigation on the one hand, or drawing suitors into needless and unnecessary expenses on the other."

The object of the suit in Benson v. Keller was to cancel several duebills alleged to have been fraudulently procured from the plaintiff by one of the defendants, and thereafter transferred by him to others of the defendants severally. The court sustained the joinder, notwithstanding that it appeared that some of the defendants were put to additional expense by reason of the fact that the cause was tried away from their home counties. The plaintiff, in bringing the present suit, had in view but the single purpose of recovering the funds of the bank, which he alleged had been wasted by the directors. All the appellants had been directors. Jesson was director from March 12, 1908, to January 4, 1911; Peoples was director from October 14, 1908, to

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April 24, 1909; Wood from November 13, 1909, to May 1, 1910; Brumbaugh from March 13, 1909, to September 12, 1910; Hill from September 12, 1908, to October 1, 1909; and McGinn from September 14, 1909, to May 1, 1910.

The appellants rely upon Emerson v. Gaither, 103 Md. 664, 64 Atl. 26, 8 L. R. A. (N. S.) 738, 7 Ann. Cas. 1114, a case in which were joined 17 directors, who had held their offices each for a short period in 12 different directorates, some of whom were charged with having declared illegal dividends, and others were charged with having made improper loans. It appeared that the defendants who were charged with making the improper loans were not directors at the time when the illegal dividends were declared. The court said:

"Are all of the defendants to be thus subjected to inconvenience, loss of time, fees of counsel, and possibly expert accountants, court costs incurred concerning matters in which they are not connected, simply because at some time they happened to be directors of the same bank?"

But the court also said:

"There is no rule on the subject of universal application, and much is left to the discretion of the court, to be determined by the facts of each particular case."

It was in view of the confusion and the difficulty of apportioning costs that the court, in that case, held that the bill was multifarious. This it doubtless had the discretion to do. But we think it clear that in the present case the court below had the discretion to permit, as it did, the joinder of the causes of action, and that in so ruling there was no error.

[2, 3] It is contended that the complaint fails to state a cause of action, in that it omits to plead the statute of the state of Nevada. This objection was not presented to the court below, and it is not suggested in the assignments of error. Nor was any objection made in the court below to the introduction in evidence of the Nevada statute. There are two reasons why the contention cannot be sustained. In the first place, the complaint did not lack necessary averments to constitute a cause of action. It alleged that the dividend was wrongfully and unlawfully and fraudulently declared and paid, with the knowledge, consent, and approval of the defendants, and set forth facts to sustain the allegation, and also alleged facts to show that the money paid out for the surrender of stock certificates was fraudulently and illegally paid out of the capital of the corporation. Those allegations were sufficient to constitute a cause of action at common law. 7 C. J. 562, § 168; Brinckerhoff v. Bostwick, 88 N. Y. 52. Again, it is our opinion that the court below was authorized to take judicial cognizance of the law of Nevada. In Mills v. Green, 159 U. S. 651, 657, 16 Sup. Ct. 132, 134 (40 L. Ed. 293), the rule is thus stated:

"The lower courts of the United States, and this court on appeal from their decisions, take judicial notice of the Constitution and public laws of each state of the Union."

The District Court of the territory of Alaska is, we think, one of the "lower courts of the United States" to which the rule should apply, and, while we find no adjudication to that precise effect, it is significant

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that in Cheever v. Wilson, 9 Wall. 108, 19 L. Ed. 604, the court held the rule to be applicable to the courts of the District of Columbia.

[4] It is contended that the purchase of the corporate stock by the appellants was not in violation of the law of Nevada. Section 68 of the Corporation Act of Nevada (Rev. Laws 1912, § 1169) provides that it shall not be lawful for the trustees or directors—

"to divide or withdraw, or in any way pay to the stockholders, or any of them, any part of the capital stock of the company, nor to reduce the capital stock unless in the manner prescribed in this act, or in accordance with the provisions of the certificate or articles of incorporation, and in case of any violation of this section, the directors or trustees under whose administration the same may have happened * * * shall in their individual and private capacities, be jointly and severally liable to the corporation, and [to] the creditors thereof, to the full amount so divided, withdrawn, or reduced, or paid out."

To pay to the stockholders the par value of their capital stock, as the court below found that the appellants did in exchange for the certificates of stock, is prohibited by the act when the payment is made out of the capital of the corporation and not out of its surplus. While it may not be said that the act prohibits the purchase of the shares of its stock by a corporation, it does prohibit the payment of any part of the capital for that purpose. A similar statute of the state of New York was under consideration in In re Castle Braid Co. (D. C.) 145 Fed. 224. The court held that the law did not broadly forbid the purchase by the corporation of its shares of stock held by its directors, and that such purchase was permissible if the transaction was fair and honest, and in the interest of the corporation and not of the selling directors. The court said of the statute:

"By implication it may forbid the purchase of any property of any description from the stockholders, and the payment therefor from the capital of the corporation; that is, from any funds except the surplus."

So in In re Tichenor-Grand Co. (D. C.) 203 Fed. 720, it was held that the New York statute, which prohibits a corporation from purchasing its own stock except out of the surplus, renders invalid a contract by a corporation with a subscriber to its stock, where the stock is issued and paid for, to repurchase the same after a stated time on notice of the subscriber's election. Other cases in point are Coleman v. Tepel, 230 Fed. 63, 144 C. C. A. 361; Hamor v. Taylor-Rice Engineering Co. (C. C.) 84 Fed. 392; Md. Trust Co. v. Mechanics Bank, 102 Md. 608, 63 Atl. 70; Tait v. Pigott, 32 Wash. 344, 73 Pac. 364; Tait v. Pigott, 38 Wash. 59, 80 Pac. 172; Martin v. Zellerbach, 38 Cal. 309, 99 Am. Dec. 365.

[5] The contention that the purchase of the stock was without the knowledge and against the instructions of the directors cannot be sustained. There was conflict in the testimony, and the court below found the facts against the appellants. The court in so finding was largely influenced by the fact that at each monthly meeting of the directors a statement of the financial condition of the corporation was presented and considered, and the fact that the records show that the directors expressly authorized in some instances the purchases of the stock, and that in other instances they approved purchases that had been made.

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The whole tendency of the testimony is to show that the directors had knowledge of all the stock transactions.

[6] The appellants contend that the appellee cannot recover in this suit funds to pay creditors who were not such at the time when the dividend was declared and the stock was purchased, and cite cases such as Atlanta & Walworth B. & C. Ass'n v. Smith, 141 Wis. 377, 123 N. W. 106, 32 L. R. A. (N. S.) 137, 135 Am. St. Rep. 42. In that case it was held that the trust fund doctrine, that under all circumstances assets of a corporation constitute a trust fund for creditors, does not prevail in Wisconsin, and that as a general rule, unless plainly prohibited by statute, or its organic act, a corporation may buy its own stock, using its assets therefor, so long as it acts in good faith, pursuant to authorization of its governing body, and that this is true both as to past and future creditors. But in the case at bar the acts of the directors, as we have seen, were prohibted by statute, and were not performed in good faith. In Cook on Corporations (6th Ed.) § 548, it is said:

"Hence the rule has been firmly established that, where dividends are paid in whole or in part out of the capital stock, corporate creditors, being such when the dividend was declared, or becoming such at any subsequent time, may, to the extent of their claims, if such claims are not otherwise paid, compel the stockholders to whom the dividend has been paid to refund whatever portion of the dividend was taken out of the capital stock."

In Coleman v. Tepel, 230 Fed. 63, 144 C. C. A. 361, it was held that where a corporation was rendered insolvent by purchasing its own stock, and giving a mortgage for the indebtedness thereby created, the transaction was void as to subsequent, as well as to prior, creditors, although there was no fraudulent intent. The court said:

"It has been urged that, if the transaction is void, it is void only as to existing creditors, and not as to those with whom the corporation subsequently incurred obligations, upon the ground that, to avoid a transfer of property in fraud of future creditors, there must be present actual intent to defraud. * * * We are inclined to hold, upon the reasoning of well-considered authorities, that the void character of such a transaction as to future creditors does not depend upon fraudulent intent, and that when a stockholder, with the knowledge he has, or with that with which he is charged, concerning the financial condition of the corporation, engages in a transaction which results in a depletion for his advantage of corporate assets below the subscribed capital, or below existing liabilities, as the law may be, and becomes a party to the solvent appearance of a business that is intended to be continued, he is bound by his act, both to existing and future creditors, when its direct object or immediate consequence is the insolvency of the corporation and injury to creditors."

In Coleman v. Booth, 268 Mo. 64, 186 S. W. 1021, the Supreme Court of Missouri held that the trustee in bankruptcy of a corporation may recover the amount received by a director through transactions with the corporation which resulted in wrongful depletion of its capital stock, even though all claims of creditors occurred subsequent to such transaction. Said the court:

"It makes no difference, in respect to this matter, whether the debts represented by the trustee were contracted before or after the illegal acts complained of."

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To the same effect is North v. Union Savings & Loan Ass'n, 59 Or. 483, 117 Pac. 822; and in Atlanta & Walworth B. & C. Ass'n v. Smith, so cited by appellants, the court said:

"We are not unmindful that the rule, in general, as to avoidance of a transfer of property in fraud of future creditors, applies only in case of actual intent to defraud them. * * * It is too restrictive, as generally stated, to apply to the situation we have here, and should, it is thought, be extended to include it, upon the theory that the duty of the stockholder not to deplete for his advantage corporate assets below the subscribed capital, and become a party to a continuance of solvent appearance, supplies the need for actual intent to defraud, where the natural and probable effect is to prejudice persons subsequently dealing with the corporation as solvent."

These decisions suggest the reason why recovery on behalf of subsequent creditors is permissible—the reason which is pointed out by Lord Watson in Trevor v. Whitworth, 12 App. Cas. 409, that persons dealing with a corporation—

"are entitled to assume that no part of the capital which has been paid into the coffers of the company has been subsequently paid out, except in the legitimate course of its business."

[7] One of the defenses pleaded by the appellants was accord and satisfaction, arising out of the following facts: On March 13, 1911, E. T. Barnette, who had been the president of the corporation, presented to the court below a petition, referring to the condition of the bank, the receivership, and the petitioner's desire to pay the money due and owing to depositors, and offering as security for that purpose the conveyance of certain real estate to the receivers. On March 20, 1911, the receivers applied to the court for instructions, expressing their opinion that, if the deeds were accepted, it would be impracticable to proceed as contemplated to fix liability against Barnette in favor of the creditors of the bank. On March 29, 1911, the judge of the court below made an order to the effect that the receivers accept the property on the conditions expressed in Barnette's petition. One of those conditions was that, after the payment of the balance of the claims and demands of the depositors and owners of unpaid drafts, the remainder of the property, if any, be returned to the petitioner. The amount realized from the rents and sale of said property up to May 1, 1914, was $30,905.65.

The contention of the appellants is that the acceptance of the property by the receivers was satisfaction and extinguishment of all liability of Barnette, and that thereby all persons jointly liable with him were released, or at least that the acceptance of the property by the receivers was a covenant not to sue Barnette, and that it operated to extinguish the causes of action against the appellants, and constituted a compromise of a tort. To this it is to be said that there is nothing in the record to show that Barnette stipulated for release from liability for his own acts, or for the acts of his associates, in the management of the bank. He stipulated in one of his deeds that the receivers were not to take possession of the property conveyed, nor the rents, issues, and profits thereof, nor have any right to the possession or use thereof, at any time prior to November 18, 1914. In the other deed it was provided that the grantees might at any time in their discretion sell the

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property therein described and apply the proceeds to the payment of depositors and the owners of unpaid drafts, and there was coupled with it the further provision that the grantees might so sell and dispose of the proceeds if on November 18, 1914, the demands of depositors and owners of unpaid drafts had not been fully paid and satisfied. By the terms of both deeds all creditors were excluded from the benefit thereof save depositors and owners of unpaid drafts. The receivers considered that their acceptance of the conveyances obligated them not to sue Barnette before November 18, 1914, and the appellee so pleaded their effect in the reply.

Again, the property was not all surrendered absolutely for the payment of the depositors and holders of unpaid drafts, but a portion thereof was surrendered only for the payment of a deficit to be thereafter ascertained as between the amounts due depositors and owners of unpaid drafts and the amount realized by the receivers out of the property and assets of the bank. None of the proceeds of the property so surrendered by Barnette in the first deed can be applied to payment of depositors and holders of unpaid drafts until all the property and assets of the bank shall have been realized on and devoted to liquidation. There was imposed upon the receivers, by their acceptance of the conveyances, the obligation to pursue all available remedies to recover the assets, including, we think, the assets which may be recovered in the present suit. While it is true that the deeds to the receivers recited that the receivers are about to commence an action on behalf of creditors against Barnette to recover from him the amount of any deficit that may be ascertained between the claims of creditors and the amount realized out of the property and assets of the bank, said action to be based on the liability of Barnette to said creditors "arising out of his management of the affairs thereof," there is nothing in the evidence to show that the deeds were accepted in accord and satisfaction of the claims of the corporation against Barnette or any of the appellants. The court below was of this opinion, and said that the transfer—

> "did not operate to release any of the defendants, and was not accepted by the receiver in satisfaction of the claims of the corporation or its creditors against any of the defendants, but such transaction was in effect an agreement not to sue Barnette prior to the expiration of the trust agreement, and instead of preventing the receiver from proceeding against these defendants, it rather rendered it necessary for him to take all proper steps to recover whatever possible upon the liabilities of any other person to the corporation or its creditors."

[8] "Accord and satisfaction requires an agreement, an aggregatio mentium, and it must finally and definitely close the matter covered by it. Nothing of or pertaining to that matter must be left unsettled, or open to further question or arrangement." 1 C. J. 527, § 12. "To constitute an accord and satisfaction, it is necessary that the money should be offered in full satisfaction of the demand, and be accompanied by such acts and declarations as amount to a condition that the money, if accepted, is accepted in satisfaction; and it must be such that the party to whom it is offered is bound to understand therefrom that if he takes it he takes it subject to such conditions." 1 Cyc. 332.

We find no error. The decree is affirmed.

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(245 Fed. 54)

GLOBE S. S. CO. v. MOSS.

(Circuit Court of Appeals, Sixth Circuit. August 1, 1917.)

No. 2966.

1. SEAMEN ⟹3—INJURY IN SERVICE—LAW GOVERNING LIABILITY.
A suit in admiralty by a seaman to recover for an injury alleged to have been caused by defective machinery or appliances on the ship is governed by the admiralty law.

2. SEAMEN ⟹29(2)—PERSONAL INJURY—DEFECTIVE MACHINERY OR APPLIANCES.
A shipowner owes to his seamen a positive and nondelegable duty to see that the ship is seaworthy and her equipment in safe condition for use when she starts on a voyage, and a seaman, injured through failure to perform this duty, is entitled to compensation.

3. SEAMEN ⟹29(2)—PERSONAL INJURIES—DEFECTIVE MACHINERY.
Libelant was assistant engineer on respondent's steamer. Soon after starting on a trip, the feed pump stopped and libelant attempted to start it, as had been done before, by forcing a piston back into the cylinder with a pinchbar; but it immediately flew back, causing the pinchbar to strike and injure libelant's head. Shortly after the injury the cylinders were opened, and the piston was found to be broken in two or three pieces. The pump had not worked well for two years, and it had frequently been necessary to start it when it stopped by external means; but during that time the cylinders had not been opened to ascertain the trouble. *Held*, that the evidence, while it did not show definitely the defect which caused the piston to fly back, was sufficient to support a finding by the trial court that the defect existed at the time the ship left port, rendering her unseaworthy, and that respondent was negligent in not ascertaining and remedying it, and was liable for libelant's injury.

4. SEAMEN ⟹29(5)—SUIT FOR PERSONAL INJURY—EVIDENCE.
In determining the negligence of respondent in maintaining the pump in an unsafe condition, the fact and nature of the accident might properly be taken into account, in connection with all other circumstances of the case.

5. SEAMEN ⟹29(4)—PERSONAL INJURY—ASSUMPTION OF RISK.
The risk of injury from the flying back of the piston, when forced into the cylinder, was not one assumed by libelant, who had a right to assume that the owner would keep the pump in a safe condition.

6. SEAMEN ⟹29(4)—PERSONAL INJURY—CONTRIBUTORY NEGLIGENCE.
In the absence of knowledge that the piston was likely to fly back, libelant was not chargeable with contributory negligence in taking a customary method of forcing it into the cylinder.

7. ADMIRALTY ⟹118—REVIEW ON APPEAL—FINDINGS OF TRIAL COURT.
A finding on a question of fact by an admiralty court, which heard the witnesses, will be accepted by the appellate court, unless the evidence greatly preponderates against it.

8. SEAMEN ⟹29(1)—PERSONAL INJURY—LIABILITY OF OWNER.
A shipowner, whose negligence contributed to the injury of a seaman, is liable therefor, notwithstanding the concurring negligence of another.

Appeal from the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

In Admiralty. Suit by Henry Moss against the Globe Steamship Company, owner of the steamer Frank C. Ball. Decree for libelant, and respondent appeals. Affirmed.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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Thos. H. Garry, of Cleveland, Ohio, and Sherwin A. Hill, of Detroit, Mich., for appellant.

Frederick L. Leckie, of Cleveland, Ohio, for appellee.

Before KNAPPEN, MACK, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. The appellee, while in the performance of his duties as assistant engineer of the ship Frank C. Ball, owned by appellant, and while on a voyage from Lorain, Ohio, to Duluth, Minn., was seriously injured in an attempt to start a defective feed pump used for supplying water to the boilers. To recover the damages suffered appellee filed libel in admiralty against the ship; the appellant giving bond to answer the decree. Upon hearing in open court, decree passed for libelant, from which this appeal is taken.

The ground on which the right to recovery is rested is that the pump was so defective as to render the ship unseaworthy as respects appellee, and to amount to a negligent failure of duty to supply and keep in order the proper appliances appurtenant to the ship—a duty analogous to the ordinary duty of a master to furnish his servant a safe place to work and safe appliances to work with.

[1, 2] The case is governed by the admiralty law. Southern Pacific Co. v. Jensen, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086; Tropical Fruit S. S. Co. v. Towle (C. C. A. 5) 222 Fed. 867, 868, 138 C. C. A. 293. The rule in admiralty is well settled that a ship owner owes to his seamen a positive and nondelegable duty to see that the ship is seaworthy and her equipment in safe condition for use when she starts on a voyage, and that a seaman injured through failure to perform this duty is entitled to compensation. The Osceola, 189 U. S. 158, 175, 23 Sup. Ct. 483, 47 L. Ed. 760; Thompson Towing, etc., Ass'n v. McGregor (C. C. A. 6) 207 Fed. 209, 211, 124 C. C. A. 479, and cases cited.

[3] The feed pump, as fastened to the floor of the engine room, was about 20 feet long; it was duplex in that it had two sides which, when not in use, were independent of each other; it was compound in that each side had both a high-pressure and a low-pressure cylinder, the steam first passing through the high-pressure cylinder and then into the low-pressure; the pistons of the high and low pressure being connected to a common piston rod, which in turn connected with a crosshead on which was bolted a plunger operating in one end of the water cylinder; another crosshead (suitably connected with the first) held another plunger. In operation the plungers alternately extended forward out of the water chambers. The feed pump was started when the boat left Lorain, which was about noon; it did not work well, and finally stopped, leaving one plunger within the chamber, the other extending out the full length of the stroke, which was about 12 inches. To start the pump appellee took an iron pinchbar, 6 or 7 feet long and weighing about 25 pounds, fulcrumed its lower end against the angle iron edge of the oil pan, which was fastened to the floor and pushed against the crosshead; the plunger was thus finally forced into the cylinder, but immediately flew back, causing the pinchbar to strike

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appellant upon the forehead, knocking him backward and causing his head to strike a metal pipe.

The refusal of the pump to start when the steam valves were opened, and the sticking of the plungers, were not a new experience; it had frequently occurred for two years before the accident. The chief engineer, who was a witness for appellant, testified that it usually happened three times out of ten when the ship left port. On such occasions the pump was started either by using a pinchbar in the way used by appellee as before described, or by the use of a chain fall—a chain in the nature of block and tackle—to pull out the plunger which was within the cylinder, or by a blow from a heavy iron sledge with all the force a man could muster against the nut on the end of one of the guide rods, a usage which had considerably battered up the nut. The chief engineer had taken part in all three of these methods of starting the pump. Sometimes after being so started it would stop and require restarting by the same process two or more times. There was testimony of credible witnesses that trouble in starting this kind of a pump was not unusual; but we agree with Judge Tuttle that:

> "A fair interpretation of their testimony is that the troubles to which they refer are not of the kind shown to have occurred with this pump. Nearly all of them speak of pumps that require a *little force* to start them. This pump frequently stuck in a way that required a *great deal of force* to start it. It seems plain from this record that this was a poor pump, did not work well, and never was in proper working order at any time during the period covered by the testimony in this case; that is, two years preceding the accident." (Italics ours.)

None of the witnesses seem to have ever known a pump which gave so much trouble as this; to some of the witnesses for appellant the use of chain fall and sledge seems to have been unheard of, and by one or more, at least impliedly, condemned. The most prominent of the suggested causes for such sticking of the plunger were air in the suction pipe, dryness of the cylinders, too tight packing, and leaking valves. We think it a fair deduction from the testimony that the experience had with this pump was such that the difficulty could be satisfactorily accounted for by neither nor all of these causes.

We are satisfied that there was something vitally and radically wrong with the pump at the time the ship left Lorain on the voyage in question. We think this indicated by the experience up to that time, and corroborated by what developed later.

Following the accident no attempt was made to operate the feed pump, nor does it seem to have been examined until the ship arrived (about midnight) at Detroit, where it picked up the chief engineer, and, after putting off appellee at the dock and sending him in an ambulance to the Marine Hospital, the ship was anchored in the river. The chief engineer then opened up the cylinders and found the piston in the high-pressure cylinder broken in two or three pieces. If this piston was broken, or even seriously cracked, before the boat left Lorain the ship was unseaworthy. One of defendant's witnesses presents the theory that the piston was broken after leaving Lorain, but before the accident; others, that the flying back of the plunger when appellee

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was hit caused the break. It is possible that the break occurred in either of the two ways suggested, but the question must be considered in the light of the evident fact that appellant has not given the court all the aid possible to be furnished. The piston was not presented in court, and seems not to have been preserved. Its production might well disclose valuable evidence on the question of its condition prior to the accident, including the evidence or lack of evidence of old cracks or breaks. The fact neither of the accident nor of the docking at Detroit was entered upon the permanent log, although it is said such record is required, and although the captain is confident he entered the facts upon the scratch log (which was lost or thrown away), and although the fact of the accident was so well in mind during the voyage that the ship was met at Duluth by its representative, who took the written statements of its seamen regarding the accident. This suppression of the record was a foolish and vain thing; but we can see no other reason for it than that suggested by the District Judge, viz.:

"So that if the owner or boat got in a lawsuit any kind of a theory could be advanced, when there was plenty of time for interested parties to think the matter over."

While, as already said, it is possible that the piston was broken by its flying back as stated, at the time of the accident, it would seem more probable that it was broken before that time. Indeed, the treatment to which the pump had been subjected for so long a time in the use not only of pinchbar and chain fall, but especially of iron sledge, would tend to injure the internal mechanism of the pump, if not the piston itself. And it seems the more reasonable conclusion, to say the least, that the application of steam would not have broken the piston, unless it were previously injured, or unless there was already some radical infirmity in the internal structure of the pump; and that it would not have failed, after 30 minutes' effort, to continue to run unless radically wrong. The suggestion that the oiler broke the piston when he started the pump on leaving Lorain seems little, if anything, more than a surmise, and is opposed to the belief of the oiler, and to his testimony that:

"She was jumping from one end to the other when I turned the steam on [and he says he "started it slow"]; then it made a sort of jump."

There is credible testimony that the pump could have run for some little time, even with the broken piston. But whether or not there was a broken piston previous to the ship's leaving Lorain (which we think the more reasonable conclusion), we are convinced that the condition of the pump at that time was so radically defective as to make reasonably probable and as to cause the accident which did happen.

Under these circumstances, an affirmative and definite showing of the precise defect which caused the plunger to fly back is not essential to liability. It is enough, as against the charge of speculation, that the conclusion that the action was due to a radical defect in the interior condition of the pump, previous to leaving Lorain, seems more reasonably probable than any other.

We agree with the conclusion of the District Judge that appellant did not use due care with respect to ascertaining and remedying the

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actual defects in the pump. The experience had during the two years preceding the accident called for a thorough examination of its internal structure. During the year preceding the year of the accident a piston rod had been broken and repaired; but, aside from this, no internal examination seems to have been had, although external means were frequently taken to relieve the difficulty, never with more than temporary success, and although the machinery would naturally be overhauled during the winter preceding the accident, and although some grinding of valves had been done at Buffalo just before the trip to Lorain, during which trip the pump seems to have worked fairly well. Whether or not the chief engineer represented the ship owner in the care of the ship, and the duty, as between the ship owner and appellee, to keep the engine-room machinery in safe condition, we think, to say the least, that due care and inquiry on the part of the fleet engineer, who had general oversight of all the boats in appellant's fleet, including the overhauling at the end of the season, would have led to the discovery of the defective condition of the pump, which every one connected with its operation during the preceding two years well knew: and it is reasonable to believe that a thorough internal examination would have disclosed the existence of radical fault and thus have led to its remedy.

[4] In reaching the conclusion that appellant was negligent in maintaining the pump in unsafe condition we may properly take into account the fact and nature of the accident, in connection with all the other circumstances in the case, notwithstanding negligence is not ordinarily assumed from the mere fact of accident. La Fernier v. Soo River Co., 129 Mich. 596, 89 N. W. 353; Byers v. Carnegie Steel Co. (C. C. A. 6) 159 Fed. 347, 351, et seq., 86 C. C. A. 347, 16 L. R. A. (N. S.) 214.

[5] In our opinion, appellant has not sustained the burden of showing that appellee assumed the risk of starting the pump. The risk of what actually happened was not assumed merely by accepting and continuing the employment. It is not enough that appellee knew the pump was defective. The plunger had never before been known to fly back; and we cannot say that appellee had reason to expect it would do so. The actual risk was thus not appreciated nor consciously assumed. C., N. O. & T. P. Ry. v. Thompson (C. C. A. 6) 236 Fed. 1, 10, et seq., 149 C. C. A. 211, and cases cited. Appellee had the right to assume, in the absence of notice to the contrary, that the ship owner would make due inspection of the pump and keep it in safe condition. C., O. & G. Ry. v. McDade, 191 U. S. 64, 67, 24 Sup. Ct. 24, 48 L. Ed. 96; C. & O. Ry. v. Proffitt, 241 U. S. 462, 468, 36 Sup. Ct. 620, 60 L. Ed. 1102. He had no right to undertake this duty himself; to have done so would probably have cost him his job.

Nor did he assume the risk by starting on the voyage from Lorain. The chief engineer had, without the knowledge of the ship owner, left the ship at Lorain, and gone to Detroit by rail, leaving the engine room in charge of appellee, whose license papers were insufficient for a ship of the size of the Ball. As a practical proposition, he had to take charge of the engine and its appurtenant machinery. It is immaterial

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to the question of assumption of risk that this undermanning of the ship was without the owner's knowledge.

Nor did the appellee assume the risk by starting the feed pump, instead of using either the injectors or the service pump. The injectors were used only in harbors, and not when the ship was at sea; the service pump was devoted to a variety of uses, including fire service, and was auxiliary only to the feed pump with respect to supplying the boilers. Moreover, the feed pump supplied hot water to the boilers, while the service pump gave only cold water; the accident occurred in December. The defect in the feed pump was discovered while at sea. Under all these circumstances, due observance of duty demanded that appellee try to start the pump, as had always been done under and by the direction of the chief engineer. The case does not fall within the general rule invoked by appellant, that an employé engaged in repair work assumes the risks necessarily incident thereto. No repair of the pump was being had or attempted; nothing that appellee did or could do would repair the defects; he was only trying to start the pump, and his employment at the time was no more in the nature of repair than would be the throwing of an engine off the center. It is also urged that appellee was guilty of contributory negligence, and so could not recover full compensation.

[6] We assume, for the purposes of this opinion, that there is in admiralty a defense of contributory negligence analogous in principle to that prevailing in common law actions. It is surely no more favorable to a shipowner than to an ordinary employer.

The burden of proof is upon appellant, and again we are satisfied that the burden has not been sustained. In the absence of knowledge that the plunger was likely to fly back, appellee was not negligent in standing in front of the pump and pushing upon the bar, instead of pulling from behind. He took the course always followed on the ship, and which enabled greater purchase than did the other way.

[7, 8] But there was testimony of several witnesses that the plunger could not fly back unless live steam was turned on or unless the bleeders (through which the water of condensation is discharged) were closed; and it is assumed that appellee either turned on the steam or closed the bleeders, or both. But this contention is not sustained by the testimony. Appellee testified that he had already tried unsuccessfully to keep the pump going by turning on the steam after using the pinchbar, and that the steam was turned off when the bar was used the previous time. This is undisputed. There is no testimony that he closed the bleeders, except that of the oiler, and he had previously given a written statement that the bleeders were not closed. The District Judge, who heard his testimony in connection with the other testimony in the case, refused to believe it, and refused to believe that appellee either turned on the steam, or knew it was turned on, or failed to open the bleeders, or after they had been opened closed them. The evidence does not preponderate against this conclusion, and we accept it as correct. City of Cleveland v. Chisholm (C. C. A. 6) 90 Fed. 431, 434, 33 C. C. A. 157; Monongahela, etc., Co. v. Hurst (C. C. A. 6) 200 Fed. 711, 119 C. C. A. 127; Pugh v. Snodgrass (C. C. A. 6) 209

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Fed. 325, 126 C. C. A. 251; Erie, etc., Co. v. Dunseith (C. C. A. 6) 239 Fed. 814, 816, 152 C. C. A. 600. Assuming what the District Judge says was plain to him, that "the steam must have been on, or the valves were defective in such a way that the steam rushed in, or that being shut off it was turned on," it does not follow that appellee turned on the steam. When the accident occurred he was at the water end of the pump, about 14 or 15 feet from the steam valve. If the steam was turned on, it is fully as likely that the oiler did it, and if the negligence of the ship owner, in failing to keep the pump safe and seaworthy, contributed to the injury, the shipowner is liable, notwithstanding the concurring negligence of the oiler. See by analogy Kreigh v. Westinghouse Co., 214 U. S. 249, 257, 29 Sup. Ct. 619, 53 L. Ed. 984 and cases cited; American Shipbuilding Co. v. Lorenski (C. C. A. 6) 204 Fed. 39, 44, 122 C. C. A. 353; Meers v. Childers (C. C. A. 6) 228 Fed. 640, 643, 143 C. C. A. 162.

Whether or not appellant was at fault in not taking appellee back to Lorain for earlier treatment, instead of going through to Detroit (The Iroquois, 194 U. S. 240, 24 Sup. Ct. 640, 48 L. Ed. 955), we need not consider, for the reason, if for no other, that the damages awarded were agreed upon by both sides as full compensatory damages; and there is nothing to indicate that the element of delay entered into the ascertainment of the amount of damages.

It results from these views that appellee was entitled to full compensation, and was not limited to relief by way of maintenance and cure, as for mere negligence in operation of the ship.

The decree of the District Court is affirmed.

(245 Fed. 60)

MINNEAPOLIS & ST. L. R. CO. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. July 21, 1917. Dissenting Opinion August 9, 1917.)

No. 4880.

MASTER AND SERVANT ⟹13—HOURS OF SERVICE ACT—CONTINUOUS SERVICE.

Hours of Service Act March 4, 1907, c. 2939, § 2, 34 Stat. 1416 (Comp. St. 1916, § 8678), provides that a railroad train employé shall not be required or permitted to remain on duty for a longer period than 16 consecutive hours, that when he has been on duty continuously for 16 hours he shall not be permitted to again go on duty until he has had at least 10 consecutive hours off duty, and that when he has been on duty for 16 hours in the aggregate in any 24-hour period he shall not be permitted to again go on duty until he shall have had at least 8 consecutive hours off duty. *Held* that, in view of the purpose of the act to keep up the efficiency of the men charged with the running of trains, where freight train crews made round trips, covering from start to return between 17 and 18 hours, the giving to such crews of an absolute release from duty of from 2 to 2½ hours at the other end of the run did not break the continuity of the service, which exceeded the statutory limit of 16 hours.

Sanborn, Circuit Judge, dissenting.

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In Error to the District Court of the United States for the Southern District of Iowa; Martin J. Wade, Judge.

Action at law by the United States against the Minneapolis & St. Louis Railroad Company. Judgment for the United States, and defendant brings error. Affirmed.

For opinion below, see 236 Fed. 414.

R. B. Alberson, of Des Moines, Iowa (F. M. Miner, of Minneapolis, Minn., Crom. Bowen, of Des Moines, Iowa, and W. H. Bremner, of Minneapolis, Minn., on the brief), for plaintiff in error.

Philip J. Doherty, Sp. Asst. U. S. Atty., of Washington, D. C. (Claude R. Porter, U. S. Atty., of Centerville, Iowa, on the brief), for the United States.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

CARLAND, Circuit Judge. This was an action by the United States to recover penalties from the railroad company for having permitted certain of its employés to be or remain on duty for a longer period than 16 consecutive hours. Section 2, c. 2939, 34 Stat. 1416. There were 19 counts in the complaint, upon each of which judgment was rendered in favor of the plaintiff. The action was tried to the court, and special findings of fact were made. The only question before us is: Do the facts found support the judgment?

The different employés of the railroad company are divided by the findings of fact into four groups.

Group 1 includes J. D. Haggin, an engineer, and H. C. Hoyer, a fireman. These employés were operating an extra helper engine between Marshalltown and Abbott, Iowa. On December 10, 1914, said engineer and fireman began service at 9:40 o'clock p. m., and continued service until 3:30 o'clock p. m. on December 11, 1914, a period which, if consecutive, is 17 hours and 40 minutes. They returned from a trip to Abbott at 4:35 a. m. December 11th, at which time they were absolutely released from service until 6:55 o'clock a. m., a period of 2 hours and 20 minutes. During said period the engine was left at the water tank. The engineer went to the roundhouse, about a block away, and registered. He then went from there to a restaurant and had breakfast, which occupied about 30 minutes. Then he returned to the roundhouse, spending about 15 minutes upon his way visiting and talking. He remained at the roundhouse until 6:55 a. m., which was the termination of the period of release. He then took charge of his engine. The engineer lived in Marshalltown, about six blocks from where the engine was left; but he did not go to his home, because he did not want to awaken his wife. There were no facilities for rest in the roundhouse, except some wooden benches; but he laid down upon one of those and slept a little for half an hour or more. He did not remove his clothes or retire for rest, except as aforesaid. The engineer registered in at Marshalltown at 4:35 a. m., after he got off his engine and walked down to the roundhouse, a block away. He registered out at 6:55 on the same morning. Hoyer, the fireman, carried a lunch with him on the engine, and generally ate a little every time the engine stopped. He left the engine at the same

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time as the engineer, did not have to register, but went direct to the restaurant, which was about two blocks from the engine, and had his breakfast; had a regular place for sleeping, about eight blocks from the yards, but did not go there to sleep, and did not sleep at all, "fooled around" until about starting time, and played some pool at the restaurant.

Group 2 includes J. P. Boyce and J. W. Gibson, engineers; B. McDonough and V. Miller, firemen; C. Vandraska, conductor; C. A. Benson and M. C. Satchell, brakemen. These men constituted a crew operating a freight train with two engines from Grinnell to Oskaloosa, Iowa, and return. They entered service at 6:30 a. m., December 27, 1914, and terminated service at 11:45 p. m. on December 27, 1914, a period which, if consecutive, is 17 hours and 15 minutes. They were absolutely released from service at Oskaloosa from 5 p. m. to 7 o'clock p. m., a period of 2 hours. What this crew was doing during the period of release does not appear.

Group 3 includes J. T. Elder, engineer; E. L. Howell, fireman; S. S. Walton, conductor; W. G. Risney and T. E. Young, brakemen. They composed a crew operating freight trains from Oskaloosa to Marshalltown, Iowa. They entered upon service at 8:45 a. m. January 20, 1914, and continued service until 2 a. m. January 21st, which, if consecutive, amounted to 17 hours and 15 minutes. There was a period of absolute release of 2 hours at Marshalltown, Iowa, from 3:35 p. m. to 5:35 p. m. on January 20th. The crew again entered service at 8:45 a. m., but waited until 9:40 a. m. before the train was ready to start. At Marshalltown the engine was left at the roundhouse, about a half block from the depot. The engineer went to the roundhouse and reported, and then went to a restaurant, about two blocks away, and ate his supper, which took 20 or 30 minutes. There was no place specially provided for sleeping. There were some pillows and bedding in the caboose, furnished by the trainmen and conductor for their own use, and they could sleep upon the cushion seats extending lengthwise; and this courtesy was extended to the firemen and engineer, if requested. Howell, the fireman, left the engine at the same time as the engineer, and went to the restaurant and had supper. Neither the fireman nor engineer had any home or place to sleep in Marshalltown, except as aforesaid, and except as to the benches that were present in the roundhouse. Walton, the conductor, also went to the restaurant; had no place for sleeping in Marshalltown, except as aforesaid; and it does not appear that he slept any at that point. What the brakeman did does not appear.

Group 4 includes B. F. Rinehart, engineer; W. F. Lewis, fireman; E. Hearne, conductor; A. C. Miller and John Donner, brakemen. They were a crew operating a freight train from Oskaloosa to Marshalltown, Iowa. They entered service on January 28, 1915, at 6:15 p. m., and terminated service at 12:10 p. m. January 29th, a period which, if consecutive, is 17 hours and 55 minutes. There was a 2-hour period of absolute release from 4:50 a. m. to 6:50 a. m. on January 29th, at Marshalltown. Rinehart lived at Oskaloosa; had no special place to sleep in Marshalltown; ate his breakfast three or four blocks from where he left his engine. There were places where workmen could

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sleep within a block or half block of the yards at Marshalltown. The fireman had breakfast about the same time; did not go to sleep; no sleeping place in Marshalltown. There was bedding in the caboose, and Hearne, the conductor, went to the caboose and went to sleep for awhile. The accommodations in the caboose were cushion seats lengthwise of the car, about 2½ feet wide and about 34 feet long. There were seats on both sides. Miller and Donner had the privilege of sleeping there. The periods of release mentioned in the four groups were absolute, and so understood by the employés.

None of the employés did any work, during the periods of release mentioned, about engines, cars, or equipments of the railroad company, or any other work in connection with their employment. Marshalltown, Iowa, is a terminal of defendant company, and a city of 16,000 or 18,000 inhabitants. Oskaloosa is a city of 8,000 or 9,000 inhabitants.

The question presented by these findings of fact is: Were the periods of release, taking into consideration the purposes of the law, periods of rest or off duty which the law requires? If they were, then there was not in any case a longer period of service or on duty than 16 consecutive hours. If, on the contrary, these periods were of such length, or at such a time and place, or in connection with such service, that, although absolutely relieved from duty, the employés did not receive that rest which it was the policy of the law to secure, then the periods of release did not prevent the hours of service from being consecutive and the law was violated. In United States v. Atchison, Topeka & Santa Fé Railroad Co., 220 U. S. 37, 31 Sup. Ct. 362, 55 L. Ed. 361, it was decided that under section 2 a telegraph operator employed for 6 hours, and then after an interval for 3 hours, is not employed for a longer period than 9 consecutive hours. By section 2 it is also provided that, where an employé of a common carrier has been continuously on duty for 16 hours, he shall be relieved and not required or permitted again to go on duty until he has had at least 10 consecutive hours off duty, and no such employé who has been on duty 16 hours in the aggregate in any 24-hour period shall be required or permitted to continue or again go on duty without having had at least 8 consecutive hours off duty. We are of the opinion that, under the law and the decision of the Supreme Court in the case cited, the period of 16 hours may be divided; but the law in regard to employés other than operators, train dispatchers, or those engaged in similar service is not the same as the law in regard to operators. The law does not say that an employé shall not be permitted to be or remain on duty for a longer period than 16 consecutive hours in any 24-hour period, and the hours of service for operators is much less than those for employés in general.

In regard to employés in general the law provides that, after an employé shall have been continuously on duty for 16 hours, he shall be relieved, and not required or permitted again to go on duty until he has had at least 10 consecutive hours off duty. This would make a total period of 26 hours. It then provides that, if an employé has been permitted to be or remain on duty 16 hours in the aggregate in any 24-hour period, said employé shall not be required or permitted

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to continue or again go on duty without having had at least 8 consecutive hours off duty; the intention of Congress being apparently that, if the 16 hours of service is divided, then the period of release affects the time which the employé is entitled to remain off duty at the end of his service. We make this statement for the purpose of showing that the time of release must be for all intents and purposes of the same character, except as to length of time as the period which the employé is permitted to be and remain off duty after the end of the period of service. It will be seen, whether we consider the period of 8 hours applicable to employés who have been permitted to be and remain on duty in the aggregate for 16 hours or the period of 10 hours applicable to employés who have been on duty for 16 consecutive hours, that the period of rest is much less than is given to operators and train dispatchers or employés engaged in like service, so that it would be impossible to divide up the 16-hour period to the same extent as may be done with the last-named class of employés. The intent and purposes of the law must not be lost sight of in attempting to divide the 16 hours of service. The object and purpose of the Hours of Service Act has been often stated by the courts, and has again been recently stated in the case of Atchison, Topeka & Santa Fé Railway Co. v. United States, 244 U. S. 336, 37 Sup. Ct. 635, 61 L. Ed. 1175 (June 4, 1917), in the following language:

> "Considering these opposing contentions, it must be remembered that the purpose of the act was to prevent the dangers which must necessarily arise to the employé and to the public from continuing men in a dangerous and hazardous business for periods so long as to render them unfit to give that service which is essential to the protection of themselves and those intrusted to their care. It is common knowledge that the enactment of this legislation was induced by reason of the many casualties in railroad transportation which resulted from requiring the discharge of arduous duties by tired and exhausted men, whose power of service and energy had been so weakened by overwork as to render them inattentive to duty or incapable of discharging the responsible labors of their positions."

That an employé is absolutely relieved from service is not of controlling importance, if the time is so short or the opportunities for rest are so meager that for all practical purposes an employé does not have the opportunity for rest which the law requires. It was decided in Southern Pacific Co. v. United States (Circuit Court of Appeals, 9th Cir.) 222 Fed. 46, 137 C. C. A. 584, that whether the break or intermission in the hours of service are such as the law will recognize depends upon their character as periods of substantial rest, and that the question as to whether the periods of release gave opportunity for substantial periods of rest was for the jury, under the evidence in each case. In United States v. Chicago, M. & P. S. Ry. Co. (D. C.) 197 Fed. 624, and United States v. Denver & R. G. R. Co. (D. C.) 197 Fed. 629, cited with approval by the Supreme Court in Missouri, K. & T. Ry. Co. v. United States, 231 U. S. 112, 34 Sup. Ct. 26, 58 L. Ed. 144, it was decided that not every release from duty was such as the law contemplated, but that each release must be determined according to the facts in the particular case. There may be cases, undoubtedly, where the release is for such a time and under such circumstances that the court may say as matter of law that the release

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was or was not such as to be within the requirement of the law; but in the present case the parties waived a jury, and submitted the facts and all legitimate inferences to be drawn therefrom to the trial court for decision. That court found that the periods of release under the circumstances did not break the consecutive character of the hours of service, and entered judgment accordingly.

We are of the opinion that the periods of release were periods of waiting which gave no proper opportunity for rest. The service was what is termed a "turn-around" service. If the train crew can be given an absolute dismissal for the time which elapses at any particular terminal before the return trip is made, with only the opportunity for rest which is shown by the evidence in this case, and such time is held to break the consecutive hours of service, then the purpose of the law will be largely defeated, and the employés permitted to remain on duty for a longer period than is lawful.

We are therefore of the opinion that the judgment should be affirmed; and it is so ordered.

SANBORN, Circuit Judge (dissenting). The statute forbids any common carrier to permit an employé to be or remain on duty "for a longer period than 16 *consecutive* hours" and provides that when he has been on duty *continuously* for 16 hours he shall not be permitted to go on duty again until he has had "at least *10 consecutive* hours off duty," and when he has been on duty "16 hours in the aggregate" he shall not be permitted to continue or go on duty without having at least *8 consecutive* hours off duty. The italics are mine, and are used to challenge attention to the fact that it is a continuous service, without break or intermission, for a long period of consecutive hours, against which the portion of the law here invoked is especially leveled, and to the fact that the term "consecutive hours" is used three times in the section, once to describe the term of continuous service permitted, 16 consecutive hours, and twice to describe terms off duty, at least "10 consecutive hours" in one case, and "at least 8 consecutive hours" in the other.

The record in this case discloses the fact that each of the employés whose service is the occasion of this action was absolutely released from duty by the employer for a definite period of at least 2 consecutive hours during a term of service which, if this intermission is counted as a part of it, did not amount to quite 18 hours, and that each employé was made fully aware of the fact of his freedom from service before this intermission therein commenced. Moreover, these releases were at terminals of the trips of the employés, or at terminals of the runs of their trains where the employés could obtain the accommodations of railroad stations, restaurants, and houses, and could be and were relieved of the mental tension as well as the manual labor of their service, and could be and were free from all care of their engines, or anything connected with the property of their employer. The law does not require the employer to compel its employés to sleep, or to rest, or to play, or to work during the intermission when they are off duty. It requires simply that they shall be relieved from continuous service

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during consecutive hours. A service of 8 hours, an intermission of 2 hours in which the employé is relieved of all duty and is free from service, followed immediately by a service of 8 consecutive hours, cannot be a service of 16 consecutive hours. If it is, then under the following provision of the statute an employé who, after serving for 16 consecutive hours, has 5 hours off duty, then 2 hours on duty, followed immediately by 5 hours off duty, has at least 10 consecutive hours off duty, and one who, after serving 16 hours in the aggregate in 24 hours, has 4 hours off duty, then 2 hours on duty, immediately followed by 4 hours off duty, has at least 8 consecutive hours off duty. This does not seem to me to be a permissible construction of the statute. The words "consecutive" and "continuously" in this statute seem to me to be not only significant, but controlling. It is common knowledge that continuous service for 16 consecutive hours exhausts, wearies, and weakens men, and tends to render them inattentive to duty, or incapable of discharging their duties, far more than an aggregate service of 16 hours in two periods of 5 hours and 11 hours each, with an intermission between them of 2 hours off duty—2 hours of absolute relief from the strain, care, tension, and labor of their duties. And it was against this exhaustion of continuous service for more than 16 consecutive hours that this statute was leveled. This is made plain by the express provision in the section under consideration that 10 consecutive hours off duty are required where the employé has been on duty for 16 consecutive hours, while only 8 consecutive hours off duty are required when he has been on duty 16 hours in the aggregate, but not 16 consecutive hours, in any 24-hour period. Judge Pollock in United States v. Atchison, Topeka & Santa Fé Ry. Co. (D. C.) 232 Fed. 196, 197, well remarked:

> "Having in mind the purpose of Congress in the enactment of the law, that purpose is better subserved by permitting an operator to work 9 hours out of 10, with one hour absolutely his own, except in cases of emergency, that he might take his meals, relax, and have recreation, than would be the case where he is permitted to work 9 * * * consecutive hours."

And in United States v. Atchison, Topeka & Santa Fé Ry. Co., 220 U. S. 37, 44, 31 Sup. Ct. 362, 55 L. Ed. 361, where a telegraph operator was employed from half past 6 o'clock in the morning until 12, and again from 3 p. m. to half past 6, or 9 hours in all, with an intermission of 3 hours, the Supreme Court declared that:

> "A man employed for 6 hours and then, after an interval, for 3, in the same 24 hours is not employed for a longer period than 9 consecutive hours."

Because each of the employés whose service was the occasion of this action was fully released from duty, and from all care, tension, and labor for his employer, and knew that fact before the commencement of the intermission, for a definite period of more than 2 consecutive hours during the time, which was less than 18 hours, that it is claimed that he was on duty, because the company was not required under the law to make him sleep or rest or recreate, nor was the company required to do more than to relieve him from duty, so that he could have an opportunity to rest his mind and his body, and relax from the strain

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and tension of continuous thought and action for his employer, because the main purpose of the provision of this law under which this action is brought was not to forbid, but to permit, service for 16 hours in the aggregate within 24 hours, where, as in this case, there is an intermission of a substantial length of time, such as 2 hours between the hours of actual service constituting that aggregate, because that provision of the law is leveled at continuous service for more than 16 consecutive hours, and its object is to relieve the weariness and exhaustion resulting from continuous mental strain and physical labor without intermission for relaxation, because employés on duty 6 hours, then off duty 2 hours, and then on duty 10 hours, are not on duty 16 consecutive hours, and because while the employés in this case were on duty, if the intermission be counted, a little more than 16 hours in the aggregate, I am unable to bring my mind to assent to the view that these men, who rendered less than 16 hours of actual discharge of duty, broken in each case by an interval or intermission of more than 2 consecutive hours, during which they were free from all duty, were on duty more than 16 consecutive hours, I am unable to resist the conclusion that the company was not liable for a violation of this law.

(245 Fed. 67)

QUICKSILVER MINING CO. v. ANDERSON.

(Circuit Court of Appeals, Ninth Circuit. September 4, 1917.)

No. 2941.

1. CORPORATIONS ⟹432(12)—OFFICERS—SCOPE OF EMPLOYMENT.

In an action against a mining company to recover for services rendered in connection with the organization of a corporation for building of an electric railroad leading from the mine to a central point, and procuring of rights of way, etc., evidence *held* to warrant a finding that the president of the corporation who engaged plaintiff was acting within the scope of his authority.

2. CORPORATIONS ⟹388(1)—ACTIONS—LIABILITY—AUTHORITY.

The president of a mining company, having suggested that the acquisition of transportation facilities would make the operation of the mine more profitable, was authorized to make a detailed report to the directors. He engaged plaintiff, who procured rights of way, obtained subscriptions, and organized a corporation for the building of an electric road from the mine to another point. The road in fact was never built. *Held* that, the president being authorized, the mining company could not defeat plaintiff's recovery on the ground that the building of the road was beyond its charter powers.

In Error to the District Court of the United States for the Second Division of the Northern District of California; Benj. F. Bledsoe, Judge.

Action by C. P. Anderson against the Quicksilver Mining Company, a corporation. There was a judgment for plaintiff, and defendant brings error. Affirmed.

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A. H. Jarman, of San Francisco, Cal., for plaintiff in error.
C. A. Herrington, of San Jose, Cal., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. The defendant in error recovered in the court below judgment for services alleged to have been rendered by him for the plaintiff in error under employment by its president. No question is here made regarding the fact of the performance of the services, nor concerning the value of them. The defense to the action in the court below was, and the basis of the contentions in this court is, that the enterprises in and about which the defendant in error was employed were beyond the scope of the powers conferred on the plaintiff in error by its charter, and, further, that they were not within the usual and ordinary business of the corporation, and therefore that its president was without authority to employ the defendant in error to render the services for which he sued and recovered.

The record shows that the plaintiff in error was incorporated by act of the Legislature of the state of New York April 10, 1866 (Laws 1866, c. 470), "by the name, style, and title of 'the Quicksilver Mining Company,' and by such name and title," the act provides, "shall have perpetual succession, and shall be capable of suing and being sued, impleading and being impleaded, and of granting and receiving, in its corporate name, property, real, personal and mixed, and of holding and improving lands in California or elsewhere, and to obtain therefrom any and all minerals and other valuable substances, whether by working or mining, leasing or disposing of privileges to work or mine such lands, or any part thereof, and to erect houses and such other buildings and works as may properly appertain to said business, and to use, let, lease or work the same, and to dispose of the products of all such lands, mines and works as they may deem proper." The act also, among other things, conferred upon the company power to make such by-laws as it should deem proper to enable it to carry out the objects of the corporation, and to alter, amend, add to, or repeal the same, provided that such by-laws should not be contrary to the Constitution of the state or of the provisions of the act of incorporation. The act also authorized the persons therein named as a body politic to elect persons to serve as directors of the corporation, a majority of whom should constitute a quorum for the transaction of business, and to hold their offices until their successors shall have been elected in accordance with the by-laws. It also declared it "lawful for said company to establish the necessary offices for the business of the company wherein their business is located, and to have their principal office in the United States, in such place as they may deem expedient, at which place it shall be lawful to hold all meetings for the transaction of the business of the company."

It appears from the record that the chief property of the company is that known as the New Almaden quicksilver mine, situate in Santa Clara county, Cal., the productive record of which, according to the brief of the plaintiff in error, is more than $150,000,000. It has been operated by the plaintiff in error for more than 40 years. The by-laws of the company provide, among other things, that "the corporate

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powers of the company shall be exercised by a board of directors, and such officers and agents as they shall appoint," and that the directors shall hold "stated, special, or adjourned meetings at such times and places as they may deem most convenient and consistent with the interests of the company," and that "the directors shall have power to delegate, from time to time, such authority as they may deem necessary to the officers of the company or to any one or more members acting as a committee in order that the business of the company may at all times be transacted with promptness and dispatch." The office of the company was established in New York City, where it has always remained.

From June, 1909, until some time in June, 1913, C. A. Nones, a resident of New York, was a member of the board of directors and president of the company, and Miss M. A. Bowe, also of New York, was likewise a member of the board, and its secretary. In February, 1910, J. T. Tatham, who was at the time bookkeeper and cashier of the company at the mine, was by Nones appointed its general manager at a salary fixed by him. In June, 1911, Tatham was elected a director and treasurer of the company, and remained such until both he and Nones were removed from their respective offices by the board of directors in June, 1913.

The property of the company is situated about 12 miles southwesterly of the city of San Jose, upon the eastern foothills of the Coast Range, being connected with the city by a boulevard known as the Almaden road. Running through it for about three miles is a creek, called Almaden creek, fed by the waters from the Los Alamedes watershed. The property embraced about 8,500 acres, a large part of which consists of agricultural land. During Nones' presidency of the company he was much of the time at the mine, and certainly its directing head in so far as concerned its usual and ordinary business. While the main business of the company was undoubtedly the mining of quicksilver, which included the use of power developed from the waters upon its land, the record leaves no room for doubt that it also included the management and disposition of the by-products of its ores and of its extensive land holdings and waters and water rights. One of the by-products was paint; and it appears from the evidence without dispute that Nones, while in charge of the property as president, concluded that it was to the interest of the company to build a paint mill, and that upon his recommendation a resolution was adopted by its board of directors authorizing the construction of such a mill, not to exceed a cost of $8,000, and directing such steps to be taken "as may be necessary under the advice of our counsel for the formation of a company to conduct such business, with the understanding that all of the stock is the property of the Quicksilver Mining Company." Payment for the services performed in the procuring of the necessary information upon which that recommendation was made by the president of the company was manifestly just as much obligatory upon it, had the recommendation not been approved, as it was upon its approval.

In precisely the same way, as shown by the record, Nones, as president of the company, concluded, while in charge of the property, that

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the waters of the creek that flowed through the company's land, and the value of its water rights, could and would be enhanced by procuring certain options on neighboring lands, and that by an addition to the then existing dam in the creek, or the building of another dam, the company would be enabled to develop more power for its own uses, and would thereby be enabled to use and dispose of the waters to better advantage, and further concluded, while so in charge of the property of the company, that a large saving in the expense of hauling the company's ores to its reduction works by teams (a distance of about four miles), and in the expense of hauling its supplies from San Jose to the mine (a distance of about twelve miles), could be effected by the building of an electric road from the mine to San Jose by way of the reduction works and through a growing community, which was anxious for the construction of such a road, and would contribute, not only rights of way therefor, but give a substantial bonus besides. These matters, it appears from the minutes of the company introduced in evidence, were reported to its directors by its president in detail, with the reasons which formed the basis of his recommendations.

Respecting the water the president in his report stated, among other things, that "owing to the contract which we have with the county, it undoubtedly has to lease all pipes for a term of 50 years from the date we elect to lease same, subject to a donation of 100,000 gallons of water per day to the county. I recommend that as soon as these pipes are properly installed that this company notify the county of its intention to lease said pipes, and this company should then transfer to the water company which is now in existence all of the water rights, receiving in payment therefor all the stock of the water company," and among the reasons stated by the president for that recommendation were, in substance, that the company could increase its supply of water, could earn some revenue from its sale to water users along its line of pipes after the water should be first passed over the service wheels, and thereby transferred into power, and that, if a dam of sufficient depth was constructed upon the company's property, "it would store up sufficient water to supply 10,000,000 gallons of water per day; that they (the San Jose Water Company) would then rather buy our rights at more than a fair price, allowing us to retain the power privileges, than to run the chance of our becoming competitors against them in the water supply business." The minutes of the company show that, acting on that report and recommendation, on motion of Director Whicher, duly seconded:

"It was resolved that the officers of the company be authorized to transfer to the California Power Company all the water rights owned by the Quicksilver Mining Company, together with the lease of the pipes of the county of Santa Clara, said lease being for a term of 50 years, and in exchange therefor to receive all stock and other securities of the California Power Company."

The minutes further show that at the same meeting, on motion of Director Whicher, duly seconded, this resolution was adopted:

"The president is therefore authorized to sell and transfer these securities at a price of not less than $150,000 in cash or its equivalent, reserving, how-

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ever, to the Quicksilver Mining Company the right for all power to carry on its business now and in the future, and for not less than 200,000 gallons of water per day."

The foregoing resolutions were adopted at a meeting held September 20, 1911. At a subsequent meeting of the board of directors, held March 18, 1912, the resolution of September 20, 1911, regarding the sale of the company's water rights, was rescinded, and in lieu thereof this resolution adopted:

"Resolved, that the officers of the company be authorized to transfer to the Senonac Power Company all the water rights owned by the Quicksilver Mining Company, together with the lease of the pipes of the county of Santa Clara, said lease being for the term of 50 years, and in exchange therefor to receive all stock and other securities of the Senonac Power Company, and the president is therefore authorized to sell and transfer these securities at a price of not less than $200,000 in cash or its equivalent, reserving, however, to the Quicksilver Mining Company the right for all power to carry on its business now and in the future, and for not less than 200,000 gallons of water per day."

The report of the president made to the board of directors at its meeting of September 20, 1911, regarding the proposed electric road, contained the following:

"Our maximum transportation tonnage has a daily capacity of not in excess of 20 tons, which we haul 7½ miles at cost of 60.2 cents per ton. For this service we were paying last year $1.25 per ton, and this saving has been effected by ownership of our teams. All of which has been paid for. In the near future we will have to consider the handling of not less than 60 tons daily and possibly 100 tons. We have reduced the cost of transportation as low as can be done, so that an increased tonnage will force us to purchase additional teams and will permit of no saving. Our calculations of hauling is based on 6 horses for every 8 tons. Only hauling 60 tons daily would cost us about $37, or about $12,000 per year. In addition to this amount we are constantly paying for the hauling of our groceries from San Jose to the mine, and we haul about 25 tons monthly, at a cost of about $4 per ton. Our entire hauling charges and feed bills amount to over $15,000 per year. I submit the proposition to the board regarding an electric road to be built from San Jose to the furnaces. There have been several meetings on this matter with the residents of the valley, who are unanimously in favor of this undertaking, and have so far subscribed in cash about $10,000; this being a donation for which they will receive neither stock nor bonds of the proposed road. I believe that this donation will amount to $15,000 before the road is built. Besides there has been granted to me personally, for about three-fourths of the distance of a private right of way of 20 feet width, and also sufficient land for turnouts and stations. The balance of the right of way necessary will have to be acquired from the county, and will cost a few hundred dollars. I am of the opinion that, if a company were formed to operate and build this line, the line could be built by a certain contractor with whom I have talked in San Jose upon the following terms: Original cost of road would not exceed $110,000, to which would be added 10 per cent. for profit, and for this the contractor would receive 6 per cent. bonds of this railroad company, less amount of cash donated by residents. Said bonds to be guaranteed principal and interest by the Quicksilver Mining Company. The cost of hauling our own freight over this line this way would be very small. A 40-ton car as a trailer could be attached to any regular passenger car without further charge, and in addition to our saving for transportation, which will be in the neighborhood of over $15,000 per year, we would also be able to carry passengers and haul freight and express packages for residents along the line. A close calculation of the population between San Jose and Almaden, gauging the same for a distance of a mile east and west along the proposed line,

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shows about 5,000 people; also three schools, with a daily attendance of 150 scholars. Also beg to call your attention to the benefits accruing to us from this electric road. Our acreage along the proposed lines is composed mostly of hills, which are nothing but grazing lands and worth not over $20 per acre. Should this line be built, these hills would be desirable building sites; we retaining our mineral rights, as has been the case in similar localities, to wit, Los Gatos and Saratoga, two places which are situated from 6 to 7 miles of our property. We also own 128 acres of land along the proposed line, which we could not sell for $48 per acre for agricultural purposes last year. This land is finely situated for a town site, and, although we have sold 10 acres at $110 per acre, we still have sufficient left to warrant setting out this land in one-half acre plots which would be sold easily at $150 per one-half acre plot. This proposition is worthy of the most serious consideration. I have devoted several months to it, and have obtained the approval of the majority of the property owners whose lands are along the proposed line of railway."

Regarding the foregoing report of the president with reference to the electric road, at the meeting at which it was presented it was, on motion:

"Resolved, that before taking action on an electric road to be built from San Jose to the mine, that the president furnish a complete specification. showing itemized costs, possible earnings, etc., to be submitted at a future meeting of the board."

Preceding the meeting at which the foregoing resolutions of the company were adopted, at a meeting of its board of directors held June 5, 1911, on motion of Director Swayne, duly seconded:

"The president was authorized to have Mr. Aaron, the company's counsel. prepare a resolution re California Power Company, to be submitted to the directors at the next meeting."

And in the deposition of Mr. Swayne, who was himself a lawyer of New York, appears, among other things, the following:

"Q. Do you know anything about the water rights belonging to the defendant company? A. Only what I have heard discussed from time to time among the directors. Q. At board meetings? A. Yes; I have never seen the property. Q. Did you ever hear discussed in a directors' meeting the proposition to construct an electric railway to extend from San Jose to New Almaden, where the works of the defendant company are located? A. Yes. Q. You also heard discussed in directors' meetings the development of the water rights and water powers owned by the company? A. Yes. Q. And the object and purpose in the development of the company's water rights and power was to enable the company both to use its power to greater advantage and to sell power, wasn't it? A. That was the plan. Q. You knew that the project of an electric railway line to connect the works with the city of San Jose was a project initiated for the benefit of the defendant company, didn't you? A. I knew that that plan was discussed; it was never authorized. Q. Was it ever objected to? A. Yes; seriously. Q. By whom? A. By Mr. O'Brien, Mr. Stern, and myself."

The record shows that the Senonac Power Company was incorporated, with a capital stock of 5,000 shares, 4,995 of which were issued to the Quicksilver Mining Company March 22, 1912, and 1 each to its president, Nones, its general manager and director, Tatham, and its attorney, Burnett, and Anderson and Brassy. Respecting the Senonac Power Company Mr. Swayne in his deposition says:

"That company was merely a subsidiary of the Quicksilver Mining Company. I believe it was organized and the transfer made, and subsequently it was dissolved."

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Preceding which dissolution it appears the Senonac Power Company reconveyed the water and water rights to the Quicksilver Mining Company. It was, according to the record, in connection with the waters and water rights, so dealt with by the plaintiff in error, that a part of the services rendered by the defendant in error were performed under the employment of the president of the plaintiff in error. The other portions so performed were rendered in connection with the proposed building of the electric road. It appears from the record that along the Almaden road, between San Jose and the mine, is a thickly settled fruit-producing community, and that the defendant in error was employed by the president of the company to secure the necessary rights of way and franchises for the road; that at the suggestion of Nones the defendant in error arranged for a public meeting which Nones, as well as Tatham, the general manager of the company, attended, and at which meeting Nones explained, among other things, that the Quicksilver Mining Company needed better transportation, and that he supposed they did; that the mining company would pay for the building of the road and would take all of the stock, but that if any of the residents living along the line wanted any of the stock they could have it; that a committee was thereupon appointed to work with the defendant in error regarding a right of way for the road—Nones asking for a free right of way from San Jose to New Almaden. Nones subsequently appointed a civil engineer named Herrmann to make a survey in connection with the defendant in error of the right of way for the proposed road, and on the 6th day of September, 1911, he wrote a letter to the chairman of the committee, in which he said, among other things:

"I take pleasure in submitting to you my proposition for the consideration of the committee, namely: That your committee obtain and collect the contemplated subscriptions, and accept all rights of way subject to the provisions hereinafter set forth; that the commencement of the building of the railroad will not be later than December 6, 1911, and the completion of the building of the railroad will be within fifteen months thereafter; that the committee make such arrangements with me that upon the final completion of the building of the railroad they will deliver to me the cash collected upon subscriptions in a sum not less than $4,500 and convey to me or my assigns the right of way that may have been gratuitously offered or donated; the said cash and the conveyances for the rights of way last mentioned shall be delivered to two trustees consisting of Mr. J. F. Tatham and another person to be selected by the committee before the 6th day of December, 1911, to be held by such trustees, and to be delivered by them to me or my assigns on the completion of the building of the railroad; that I or my assigns will furnish the money requisite to pay for the rights of way where present options call for money payment after the receipt by me or my representative of all public franchises for running on such parts of the public highway as may be applied for."

The proposition so submitted having been accepted, the defendant in error proceeded to collect numerous subscriptions from the residents along the proposed line, and to secure rights of way therefor from such residents, as also franchises from the county of Santa Clara over roads of the county, following which the road was incorporated, to wit, October 19, 1911, under the laws of California under the name "San Jose & Almaden Railroad Company," with a

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capital stock of $120,000, divided into 1,200 shares, of the par value of $100 each—the original subscribers being the defendant in error 1 share; Tatham, general manager of the mining company, 1 share; Burnett, attorney for the mining company, 1 share; Nones, president of the mining company, 117 shares; those issued to the defendant in error, Tatham and Burnett being indorsed in blank by them respectively. Tatham testified, among other things, as follows:

"I was vice president and treasurer of the San Jose & Almaden Railroad Company. The stock of this railroad company belonged to the Quicksilver Mining Company. About $5,000 was expended for the promotion of the preliminary work of this railroad company. The money paid out belonged to the Quicksilver Mining Company. I paid it out. A portion of it came from the office at New Almaden, and a portion came from the New York office; $3,000, I think, came from New York, and $2,000 from the office at the mine. A little work was done, cutting down a bluff to the entrance of the hacienda. It was done by the Quicksilver Mining Company and paid for by it. Surveys were made and paid for by the mining company. Abstracts were also secured, amounting to $225. The survey cost in the neighborhood of $500. These bills were paid for by the mining company."

Tatham also testified that, when the stock in the electric road company was issued to Nones, the latter said it was so issued in trust for the Quicksilver Mining Company—a fact which the whole record plainly shows. Indeed, in view of the facts disclosed by the record, we think it idle to contend that the court below was in error in concluding that the president of the plaintiff in error had at least implied authority to employ the defendant in error to perform the services for the value of which he sued and recovered. It is true that it appears that, about the time the defendant in error concluded his employment, he received in the office of the local attorney of the company the following instrument:

"New Almaden, Cal., March 5, 1912.

"C. P. Anderson, Esq., San Jose, Cal.—Dear Sir: For services rendered and to be rendered on the line of San Jose & Almaden R. R., I hereby agree to pay you the sum of forty-five hundred ($4,500) dollars, payable on completion of the road.

"Yours truly, Charles A. Nones."

And it is also true that in at least one place in the testimony of Nones he states that the defendant in error was employed, not for the Quicksilver Mining Company, but by himself individually. That statement of the witness is not only in conflict with other portions of his testimony, but in positive conflict with his report to the directors of the mining company respecting the building of the road, and in obvious conflict with this sworn statement made by him respecting the obligation so given to the defendant in error, made in his schedules filed in his bankruptcy proceedings, which subsequently occurred:

"Names of creditors: C. P. Anderson.

"Residences: San Jose, California.

"When and where contracted: San Jose, California, January, 1911.

"Nature and consideration of debt and whether any judgment, bond, bill of exchange, promissory note, etc., and whether contract as partner or joint contractor with any other person; and, if so, with whom; guarantee of payment for work done for Quicksilver Mining Company.

"Amount: $4,500."

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[1, 2] It is nowhere pretended that Nones had any personal business anywhere in Santa Clara county. His sole business there, so far as appears, was as the representative and head of the mining company; his employment of the defendant in error in connection with the increase of the waters appertaining to the company's lands and the increase of power therefrom was plainly for and in the interest of the company which placed him in charge of the property; and so in respect to the employment of the defendant in error for the procuring of rights of way, franchises, and subscriptions for the proposed electric road, designed, as the president of the company expressly informed its board of directors, to reduce the expenses of the company in the matter of hauling its ores and supplies, and at the same time to earn for it money out of passenger traffic. Whether or not the construction of the road for such purposes was beyond the powers conferred upon the mining company is a question that does not arise in this case. As a matter of fact, as shown by the record, the road was not built, and the plaintiff in error proceeded no further than the organization of a corporation looking to its construction, and the payment of all the costs and expenses of the undertaking, so far as appears, except the fair worth of the services rendered in that behalf by the defendant in error under the employment of its president, in the circumstances that have been stated.

We see no merit whatever in any of the contentions of the plaintiff in error, and accordingly the judgment is affirmed.

(245 Fed. 75)

GILL v. WATERHOUSE.

(Circuit Court of Appeals, Ninth Circuit. August 20, 1917.)

No. 2903.

1. GUARANTY ⟹91—PAYMENT OF GUARANTEED ACCOUNT—EVIDENCE.
   Evidence *held* to show that plaintiff did not buy a guaranteed account, but, at the request of one of the guarantors, paid it.
2. GUARANTY ⟹64, 65—PAYMENT OF GUARANTEED ACCOUNT—EFFECT.
   A guaranteed account being not bought but paid by plaintiff at request of one of the guarantors, it and the guaranty are thereby satisfied.
3. GUARANTY ⟹64, 65—PAYMENT OF ACCOUNT—REVIVAL.
   A guaranteed account, with the guaranty satisfied by payment thereof by plaintiff at request of one of the guarantors, is not revived by subsequent assignment thereof to him.
4. TRIAL ⟹139(1)—TAKING CASE FROM JURY—INSUFFICIENT EVIDENCE.
   A case is properly taken from the jury and dismissed where the evidence, conceding all the inferences which the jury can justifiably draw from it, is insufficient to warrant a verdict.

In Error to the District Court of the United States for the Northern Division of the Western District of Washington; Jeremiah Neterer, Judge.

Action by John Gill, for whom has been substituted Maurice McMicken, his administrator with the will annexed, against Frank Water-

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house. There was a judgment of dismissal, and plaintiff brings error. Affirmed.

It appears by the complaint herein that the Commercial Bank of Scotland, Limited, with its principal place of business at Edinburgh, Scotland, agreed to make to Frank Waterhouse, Limited, a corporation doing business in London, certain further advances upon being guaranteed by the defendant Frank Waterhouse the payment of such advances as had theretofore been made, as well as such as should thereafter be made, not to exceed £21,000, and that thereupon the defendant executed the following guaranty:

"To The Commercial Bank of Scotland, Limited. I, Frank Waterhouse Tacoma, Washington, United States, America, hereby guarantee you payment of all sums for which Frank Waterhouse, Limited, of one hundred and forty-seven Cannon street, London, whether on an account or accounts kept in their name in your books and operated on for them by checks or drafts signed by two of their directors and their secretary, all for the time, or on bills, promissory notes or other obligations, are or may be liable to you, but the amount for which I shall be liable under this guaranty shall not exceed twenty-one thousand pounds sterling with interest from the date or dates at which the said Frank Waterhouse, Limited, have become or shall become indebted to you; and I declare (1) that you shall be entitled to require from me whenever you think fit, a payment or payments to account of my liability; (2) that you may grant to the said Frank Waterhouse, Limited, or to the obligants in any bills of exchange or promissory notes, or other writings received by you from them, or in which they may be liable to you, time or other indulgence, and compound with them or such obligants, and may give up any securities which you now have or may hereafter have belonging to the said Frank Waterhouse, Limited, or to others, all without consulting me, and without affecting my obligation to you; (3) that I shall not be entitled to rank on the estate of the said Frank Waterhouse, Limited, in respect to any payment or payments to account as aforesaid, nor to have the benefit of any securities such as aforesaid until your whole claims against them are satisfied; and (4) that this guaranty is a continuing obligation and can be recalled by me only by writing and shall remain in force notwithstanding my death until recalled in writing, and shall apply to all sums for which the said Frank Waterhouse, Limited, shall become indebted to you prior to such recall."

It then further appears that the bank advanced large sums to Frank Waterhouse, Limited, and, that concern having failed to repay the same, that demand was made upon the defendant, on October 31, 1906, for payment under his guaranty, which was refused, and that the bank, prior to the commencement of this action, assigned the demand to plaintiff's testator.

The defendant pleads payment of the demand prior to any assignment of the letter of guaranty, and avers that, at the time of the execution and delivery thereof, other letters of guaranty of like import were executed, for the same purpose and to secure the same indebtedness, and delivered to the bank, all of which letters, including that of the defendant, were accepted by the bank; and that the bank, subsequent thereto, released all the other guarantors from liability.

At the close of plaintiff's testimony the defendant moved for a dismissal of the cause on the ground that the testimony adduced was insufficient to warrant a verdict in favor of plaintiff. The motion was allowed, and judgment rendered accordingly.

Otto B. Rupp and Hughes, McMicken, Dovell & Ramsey, all of Seattle, Wash., for plaintiff in error.

Harold Preston, Bogle, Graves, Merritt & Bogle, and O. B. Thorgrimson, all of Seattle, Wash., for defendant in error.

Before GILBERT and HUNT, Circuit Judges, and WOLVERTON, District Judge.

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WOLVERTON, District Judge. This brings into the record the sole question of the sufficiency of the testimony to justify the sending of the case to the jury.

The first question presented is whether it was essential that notice should have been given to the defendant by the Commercial Bank of Scotland of the bank's acceptance of the guaranty; no such notice having been proven. This we will waive, as we deem the testimony insufficient to show that the plaintiff is the owner of the demand of the bank against Frank Waterhouse, Limited, or any part of it, together with the guaranty of the defendant, or is in a position to enforce the guaranty. The testimony having any relation whatever to the subject is brief, and may be noted shortly.

John Gill, the plaintiff's testator, at the request of Alexander McNab, one of the persons who executed and delivered to the bank guaranties like that of the defendant, and at the same time paid to the bank, on February 15, 1907, the amount guaranteed. At that time no assignment was made by the bank to Gill, either of its demand against Frank Waterhouse, Limited, or of the guaranty, nor does it appear what agreement was made between the bank and Gill respecting the transaction of payment of the bank's demand by Gill. James Gill, a grandnephew of John Gill, produced what he termed an assignment of the letter of guaranty by the bank to John Gill, which bears date October 8, 1907, and includes as well the claim of the bank against Frank Waterhouse under the guaranty. On cross-examination the witness says:

"I have no direct personal knowledge of the initiation of the transaction between the late John Gill and the Commercial Bank of Scotland, Limited, but my understanding is that the bank were desirous that the debt due by Frank Waterhouse, Limited, should be repaid, and that Mr. Alexander McNab, who was one of the guarantors and who was not, I understand, in a position to meet the guaranty if it were enforced against him, approached the late John Gill as a friend, and asked him to take over the debt; that the late John Gill agreed to do so, and paid off the debt, which amounted to £22,897. 16. 5, and obtained the assignation before mentioned by the Commercial Bank of Scotland, Limited, in favor of himself as an individual, in consideration of said payment by him to the bank, and that the payment was made by check or checks by the late John Gill. I have not been able to find the check or checks among the late John Gill's papers."

Later the witness says:

"I have found among the trust papers certain documents relating to the assignation by the bank and to the present suit, but these did not contain any record of any transaction with Mr. McNab in relation thereto. * * * I have no knowledge of any agreement, written or verbal, between the late John Gill and Alexander McNab or any other person of the nature referred to in this interrogatory," namely (quoting from the interrogatory), "whereby said McNab was entitled to or obligated to repay to John Gill any moneys advanced or paid by John Gill to the Commercial Bank of Scotland, Limited, on this transaction, or under which Alexander McNab was or is entitled to share in the proceeds of this suit, or of any collection made from said letter of guaranty of said Frank Waterhouse, defendant, or to repay to or indemnify John Gill against any losses he might sustain by reason of any moneys he paid or advanced to the Commercial Bank of Scotland, Limited, on said letter of guaranty, or in the purchase thereof?"

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James Lawson Anderson, secretary of the Commercial Bank of Scotland, Limited, testifies:

"The amount due to the bank by Frank Waterhouse, Limited, on the said accounts was paid to the bank by John Gill, solicitor Supreme Courts, Edinburgh, and the bank granted an assignation in his favor of the amount so paid and of the guaranty by Frank Waterhouse in favor of the bank. The assignation was granted on 8th October, 1907. * * * The bank also held letters of guaranty by Alexander McNab, John McNab, R. B. Archibald, Marshall McEwen & Co., and the partners thereof, and John M. Mitchell. These guaranties have not been assigned or transferred by this bank, but on payment being made by John Gill they were sent to him. John McNab is dead. * * * The payment of £22,897. 16. 5 was made to the bank by the said John Gill in exchange for the assignation in his favor. The payment was made by a check of his own, I understand. I have not the particulars of the check. * * * I did not participate in the negotiations leading up to the execution of the assignation to the said John Gill, and have no knowledge of any understanding, agreement, or contract, written or verbal, between the defendant, John Gill, and Alexander McNab, or between John Gill and Alexander McNab. There was no understanding, agreement, or contract, written or verbal, in regard to this matter between the bank and Alexander McNab. * * * I do not know what interest John Gill had in paying up the advance and taking an assignation of the said guaranty. He did not ask for an assignation of the other guaranties, so far as I am aware."

William McEwen testifies:

"Subsequently I wrote to the Commercial Bank of Scotland, Limited, intimating my appointment and asking them to send me a certified statement of their claims in the liquidation. They informed me that the company's indebtedness to them has been settled by Mr. John Gill, S. S. C., Edinburgh, and that they had assigned their claim to him. Mr. Gill subsequently rendered his claim to me as liquidator of the company (Frank Waterhouse, Limited), and I admitted the claim. I have paid to the said John Gill, and after his death to his executors, dividends in respect of Mr. Gill's claim in the liquidation. The sums which I have paid to him and them to date amount to £2924. 17. 4."

William Bamford Lang, an assistant agent in the Commercial Bank of Scotland, Limited, testifies:

"I had no negotiation with any party regarding the assignation of the claim by the bank. This was all arranged by the head office in Edinburgh, and at the time I was in the London office. The advances were repaid by the late Mr. John Gill, S. S. C., Edinburgh."

The foregoing excerpts from the testimony contain all there is in the record which has any material bearing upon the transaction between Gill and the bank in making payment of the Frank Waterhouse, Limited, indebtedness. It may be stated further, however, that the record does show that Alexander McNab, Frank Waterhouse, and John M. Mitchell were original shareholders in Frank Waterhouse, Limited, and that John Marshall, John McNab, and Bruce Archibald became shareholders on March 31, 1898. It further appears that on October 6, 1900, Frank Waterhouse and Frank Waterhouse, Limited, entered into an agreement whereby Waterhouse agreed to form an American company, and that said company should purchase the assets of Frank Waterhouse, Limited, subject to charges affecting the same, and should pay therefor $230,000, and, in addition to the price to be paid, that the American company should assume and pay all the indebtedness of Frank Water-

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house, Limited, in the state of Washington, the said Frank Waterhouse, Limited, agreeing to discharge all of its London indebtedness with the purchase money, except to Trinder, Anderson & Co., London. The articles of incorporation of Frank Waterhouse & Co. are also in evidence, showing a compliance, to that extent at least, by Waterhouse with his agreement.

The primary debt was the obligation of Frank Waterhouse, Limited, to the bank. Waterhouse's guaranty stood as a surety for that debt in the amount named in the guaranty. When John Gill paid the money at the bank, he paid the indebtedness of Frank Waterhouse, Limited. This, the evidence indicates, he did at the request of Alexander McNab. McNab was held to the bank under a like guaranty as Frank Waterhouse. This implies an agreement on the part of McNab to repay Gill. But what of any agreement between Gill and the bank? The assignation, it is true, shows a very specific agreement; but that paper was executed nearly eight months after the transaction of payment took place. James Gill relates that Alexander McNab approached Gill and asked him "to take over the debt," and that Gill "agreed to do so." The witness, however, frankly stated in the beginning that he had no personal knowledge of the initiation of the transaction between Gill and the bank. Further than this, he does not give the source of his understanding, who told him, nor how he came by it. So that his testimony on the subject stands as the sheerest kind of hearsay. Anderson, the secretary of the bank, says: "The payment of £22,897. 16. 5 was made to the bank by the said John Gill in exchange for the assignation in his favor." He says further, however, that he did not participate in the negotiations leading up to the execution of the assignation to Gill. It is quite apparent that what he said about the "exchange for the assignation" was from the paper itself, and not from any personal knowledge of the initial or subsequent transaction in paying the money or taking the assignation. So his testimony is worthy of no greater weight than that of James Gill. What the witnesses say, therefore, proves nothing as to any agreement entered into by Gill with the bank at the time of payment.

We might assume that an inference is deducible that the assignation correctly recites the agreement as actually entered into at the time of payment from the fact that it was subsequently executed and delivered, but the counter inferences are so strong as to repel that assumption. Gill was himself a solicitor of long standing, and must have understood well the legal effect of what he did. The bank was undoubtedly well versed respecting banking methods and the legal formalities necessary for transferring title to a claim or demand. Furthermore, the request of McNab shows that what Gill did was for his accommodation. The bank made no assignment to Gill of McNab's guaranty; nor did it of the guaranty of any of the other persons who stood in the same relation to the bank, as it respects the Waterhouse, Limited, account, as did Frank Waterhouse. It is scarcely probable that a person of Gill's learning, sagacity, and experience in legal affairs would have purchased a demand of the kind of the bank, without taking with it all the securities for its payment that the bank held.

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This he would have done at once when the money was paid. Furthermore, no agent or employé of the bank has been called to testify concerning the initial agreement; nor have the persons who executed the assignation for the bank, nor the witnesses thereto. Beyond even this, the agreement between Frank Waterhouse and Frank Waterhouse, Limited, in which company McNab was interested as a stockholder, has some bearing. By that agreement, the London indebtedness was to be taken care of, to the relief of the defendant. McNab was undoubtedly cognizant of this, and hence the direct inducement on his part to request Gill to pay the Frank Waterhouse, Limited, demand at the bank.

[1-3] In the light of all the circumstances and conditions attending the transactions, there can scarcely remain two opinions relative to whether Gill purchased the account of Frank Waterhouse, Limited, or so much of it as the Frank Waterhouse guaranty would pay, from the bank, or simply made payment to that amount upon the account. The most natural thing for men of business affairs to have done, if it were a purchase of the account, was to take an assignment of it at once, together with all the guaranties, and if it were not a purchase, simply to do as they did, pay the money, and let it be applied on the account, as was done. When, therefore, the money was paid, the account was satisfied to the extent of the payment, and a subsequent assignment by the bank could not revive it; and, of course, the account being satisfied, the guaranty was satisfied also, and Gill has his recourse only against McNab, at whose request he made the payment. The conclusion thus reached is borne out by the following analogous cases: Lee v. Field, 9 N. M. 435, 54 Pac. 873; Penwell v. Flickinger, 46 Mont. 526, 129 Pac. 323; Moran v. Abbey, 63 Cal. 56; Day v. Humphrey et al., 79 Ill. 452.

[4] But it is urged that the court should have submitted the case to the jury. If the court is satisfied, conceding all the inferences which the jury can justifiably draw from the testimony, that the evidence is insufficient to warrant a verdict, it is the duty of the court to withhold the case from them. Sloss Iron & Steel Co. v. South Carolina & G. R. Co., 85 Fed. 133, 29 C. C. A. 50.

The proposition has been stated in another way: That where the evidence as to material facts is contradictory, or where the facts are admitted or undisputed and are such that reasonable men can fairly draw opposite conclusions from them, the question is for the jury; but where there is no dispute about the facts, and they are such that but one conclusion can be fairly drawn from them by reasonable men, then the question is not for the jury. Northwestern Fuel Co. v. Danielson, 57 Fed. 915, 6 C. C. A. 636.

But the most common way of stating the proposition is that adopted by the Court of Appeals in this circuit, namely, that "the trial court may direct a verdict in any case where the evidence is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it." Shoup v. Marks, 128 Fed. 32, 62 C. C. A. 540. See, also, Pat-

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ton v. Texas & Pacific Railway Co., 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361.

We think that, applying the rule under either statement, the trial court properly refused to submit the cause to the jury, and was right in directing a dismissal.

Exception was taken to the allowance of objections to the introduction of certain testimony on the ground that it was hearsay. This testimony is in line with certain of that upon which we have commented. In the view we have taken, it can have no practical effect whether the testimony objected to is in or out. The result must be the same in either event. It only emphasizes the state of mind of the trial court upon the subject, in which we concur. If it be conceded that there was error in rejecting the testimony, it was, in the light of the record, harmless.

Another assignment of error relates to the introduction of the agreement between Frank Waterhouse and Frank Waterhouse, Limited, touching the formation of the American company. This document was attached to cross-interrogatory No. 5 propounded to the witness McEwen, and was marked as an exhibit thereto, and went in as such. Although objection was made to the introduction of the paper, there was no ruling by the court, and no exceptions were saved.

The next assignments of error insisted upon relate to the rejection of a copy of the accounts between Frank Waterhouse, Limited, and the bank. Again, under the view which we have taken of the case, these accounts are rendered wholly immaterial; and, if error was committed in rejecting them, it was harmless.

Judgment affirmed.

(245 Fed. 81)

KNUDSEN et al. v. FIRST TRUST & SAVINGS BANK et al.

(Circuit Court of Appeals, Ninth Circuit. August 20, 1917.)

No. 2878.

1. COURTS ⟹493(1)—JURISDICTION—CONCURRENT JURISDICTION.

Where the controversy is the same in actions pending in courts of concurrent jurisdiction and the parties are the same, ordinarily that court first acquiring jurisdiction will retain it to the exclusion of the other, though possession of the res is not taken through a receiver or otherwise.

2. COURTS ⟹493(3)—JURISDICTION—FEDERAL COURTS.

Pendency of an action in a state court is no bar to proceedings concerning the same matter in a federal court having jurisdiction.

3. COURTS ⟹493(3)—JURISDICTION—FEDERAL COURT.

Appellants, who purchased land from an irrigation company, filed in the state court an action wherein it was alleged that the irrigation company was the owner of large quantities of land; that as an inducement to purchasers it represented to appellants and others that an irrigation system was to be formed; that water would be supplied and the rights maintained in perpetuity for an annual payment; that it collected the payment, but had not been paying the water charge for a large acreage; that it dissipated the funds arising from such payment, so that there was an immediate demand for the expenditure of a large sum of money

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for the restoration of the system; and that therefore appellants and other purchasers had a first and prior lien on all of the assets of the company. Subsequently the company filed a voluntary petition in bankruptcy, and a trustee was appointed. Thereafter respondents filed a bill in the federal court to foreclose a trust deed given by the irrigation company, and a receiver was appointed. *Held*, that as the federal court first acquired possession of the irrigation company's property, it would, even though the state court had co-ordinate jurisdiction and appellants' suit therein was the first filed, retain jurisdiction.

4. COURTS ⟹493(3)—JURISDICTION—FEDERAL COURT.

As the issues in the two suits were different, that one in the federal court being the foreclosure of a trust deed, while the one in the state court was evidently designed for the maintenance of the irrigation company as a going concern and to require some sort of a readjustment so that purchasers of land might reap the benefits of their purchase, the federal court will retain jurisdiction, despite the prior institution of proceedings in the state court.

Appeal from the District Court of the United States for the District of Montana; Geo. M. Bourquin, Judge.

Suit by the First Trust & Savings Bank and another, trustees, against the Bitter Root Valley Irrigation Company and Hans B. Knudsen and another. From an order sustaining plaintiffs' motion to strike a defense (237 Fed. 733), the last-named defendants appeal. Affirmed.

The appellees, who were the complainants below, on April 8, 1916, instituted a suit to foreclose a trust deed given by the Bitter Root Valley Irrigation Company upon its property, both then held and subsequently to be acquired, to secure the payment of a large amount of bonds.

The defendants and appellants here, Hans B. Knudsen and Caroline Knudsen, appearing made answer to the bill, in effect, that on June 24, 1915, they commenced an action in the District Court for the Fourth Judicial District of the state of Montana, county of Ravalli, against the Bitter Root Valley Irrigation Company, the First Trust and Savings Bank, and other persons and corporations interested in the affairs and property of the irrigation company, wherein it was alleged in effect that the irrigation company was the owner of large quantities of real property; that it had assumed the construction and operation of an irrigation district, comprising such real property; that as an inducement to purchase such lands from the company it had represented to plaintiffs therein and others that an irrigation system of 40,000 acres was to be formed, and that water therefor would be supplied and the rights therein maintained in perpetuity for the sum of $1.25 per acre, payable annually; and that, to the accomplishment of that end, it proposed to assess the irrigable lands the sum of $1.25 per acre, the money to be so realized to be used only for the upkeep of the system; and wherein it was further alleged that the irrigation company had contracted for the sale of 22,000 acres of said lands to a large number of persons and had been collecting from such purchasers for a number of years $1.25 per acre, but had not been paying the water charge for a large acreage that the company itself had been using and cultivating, nor had it been paying the water charge as it pertained to the unsold lands; that the said irrigation company had squandered and dissipated the funds arising from the $1.25 assessment, had failed to acquire water rights sufficient for the performance of its covenants to the purchasers, and had failed to maintain the system in proper condition for the service contemplated, and that, by reason thereof, there was an immediate demand for the expenditure of large sums of money for the restoration of the system, and for completing the same as originally contemplated by the scheme; that it was further alleged in said action that the irrigation company was insolvent, and unable to pay its obligations or to make needed repairs, or to complete the system, or to

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replenish the wasted and squandered funds, "which constituted a trust fund for the maintenance and upkeep of said system"; that it did not intend to carry out or perform further any of its covenants and obligations; that the plaintiff in said action, and others similarly situated, "had by virtue of the premises and by operation of law and equity a first and prior lien and claim upon all of the assets of every kind, character, and description of the Bitter Root Valley Irrigation Company," and that the lien created by the deed of trust of the bank and Boisot, trustee, is inferior in point of time and right to the lien claimed by the plaintiffs in said action; that it was alleged that it was necessary that said irrigation system be completed as contemplated, and that, to that end and to secure the enforcement of the lien claimed by the plaintiffs thereon, it was requisite that a receiver of the properties and assets of the company be appointed, and that receiver's certificates be issued, and that the assets of the company be marshaled and placed in the custody of the court for the purpose of completing the irrigation system. And it was further alleged by the answer that it appears from the complaint filed in that action that "it is probable or possible that at some stage of the litigation therein the appointment of a receiver will be necessary to accomplish the execution of the judgment and decree of said state court, and that the receiver so to be appointed must be one of the selection of said state court and subject alone to its jurisdiction;" that on January 3, 1916, the irrigation company filed its voluntary petition in bankruptcy, and on February 23 F. C. Webster was appointed trustee.

This same trustee in bankruptcy was appointed receiver by the District Court of the United States on the filing of the bill to foreclose complainants' deed of trust. The possession of the property went into the hands of the trustee, and is now held by the receiver.

The prayer of the answer was that the federal court proceed no further, but permit the suit pending therein to remain in statu quo, or that it proceed so far only as to determine the rights of the complainants against the irrigation company, but not with reference to any of the claimed rights of the answering defendants, and that the trustee in bankruptcy be required to enter an appearance in the suit in the state court.

A motion was interposed to strike the affirmative answer. This was allowed, and the defendants appeal.

R. F. Gaines, of Butte, Mont., D. S. Wegg, of Chicago, Ill., and Geo. T. Baggs, of Stevensville, Mont., for appellants.

Winston, Payne, Strawn & Shaw, of Chicago, Ill., and Henry C. Stiff, of Missoula, Mont. (Silas H. Strawn, Garrard B. Winston, and R. S. Tuthill, Jr., all of Chicago, Ill., of counsel), for appellees.

Before GILBERT and HUNT, Circuit Judges, and WOLVERTON, District Judge.

WOLVERTON, District Judge (after stating the facts as above). The central question presented by this appeal is whether, by the rules of law relating to conflicting jurisdiction of courts or by reason of the comity existing between the federal and state courts, the District Court of the United States ought to entertain and maintain jurisdiction through its receiver of the res, which is the property subject to the trust deed of complainants.

[1] Where the controversy is the same in actions pending in courts of concurrent jurisdiction, and the parties are the same, the general rule, supported by the weight of authority, seems to be that the court first acquiring jurisdiction of the controversy will retain it to the exclusion of the other, though possession of the res be not taken,

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through a receiver or otherwise. In re Lasserot, 240 Fed. 325, 153 C. C. A. 251; Gluck & Becker on Receivers, 67, 68 (2d Ed. 89, 91), cited in Empire Trust Co. v. Brooks, 232 Fed. 641, 646, 146 C. C. A. 567.

[2] Nevertheless it is true that the pendency of an action in a state court is no bar to proceedings concerning the same matter in a federal court having jurisdiction. McClellan v. Carland, 217 U. S. 268, 30 Sup. Ct. 501, 54 L. Ed. 762.

[3] The possession of the res vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and this to the exclusion of other courts of co-ordinate jurisdiction assuming to exercise like power. Farmers' Loan, etc., Co. v. Lake St. Rd. Co., 177 U. S. 51, 20 Sup. Ct. 564, 44 L. Ed. 667; Palmer v. Texas, 212 U. S. 118, 29 Sup. Ct. 230, 53 L. Ed. 435.

"Nor," says the court in the Farmers' Loan Company Case, supra, "is this rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another court, but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in suits of a similar nature where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected. The rule has been declared to be of especial importance in its application to federal and state courts."

In this case the Farmers' Loan & Trust Company commenced its suit to foreclose in the federal court, on January 30, 1896, at 10:35 a. m. On the same day, but shortly after the bill had been filed, the Lake Street Elevated Railroad Company filed its bill to restrain and enjoin the loan company from prosecuting any suit to foreclose, and a writ of injunction was forthwith issued and served. It was held that the federal court first obtained jurisdiction of the res by reason of the filing of its bill, notwithstanding the injunction in the state court was first issued and served, the court saying:

"The bill filed in the federal court looked to the enforcement of the trusts declared in the mortgage, the control of the railroad through a receiver, the sale of the railroad, and the final distribution of the assets of the company."

The Palmer Case was a proceeding in the state court of Texas to forfeit a permit of the oil company to do business in that state. The receiver had been appointed and qualified, and process served, although he had not taken actual possession of the property, and it was held that the state court had acquired constructive possession of the res as against the propriety of the federal court assuming possession through a receiver appointed by it.

These cases are illustrative of the application of the doctrine stated in the above-quoted paragraph.

A case also quite apposite for illustration of the principle is McKinney v. Landon, 209 Fed. 300, 126 C. C. A. 226. The state of Kansas, through its Attorney General, instituted quo warranto proceedings against a group of gas companies, with prayer for ouster and the appointment of receivers to take charge of the property and business. The cause was tried in the state court, and taken under advisement.

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While it was in this condition suits were instituted in the federal court, one alleging insolvency and praying appointment of a receiver, and the other to foreclose, and a receiver was accordingly appointed before any was appointed by the state court. The jurisdiction of the federal court of the res was denied, the court saying:

"That actual seizure or possession is not essential, but that jurisdiction may be acquired by acts which according to established procedure, stand for dominion and in effect subject the property to judicial control."

[4] There is another principle enunciated by the courts and text-writers, namely, that where the controversy is not the same, that is, where the issues in one suit are different from those involved in another, and the subject-matter is not identical, there can be no infringement of jurisdiction as between the courts maintaining cognizance of the cases. This, it is maintained, rests on the ground that in such a case there is no conflict of jurisdiction as to the question or cause. In such cases, the first acquisition of the possession of the res dominates the authority to retain the same. Empire Trust Co. v. Brooks, 232 Fed. 641, 146 C. C. A. 567; Compton v. Jesup, 68 Fed. 263, 283, 15 C. C. A. 397; De La Vergne Refrig. Mach. Co. v. Palmetto Brewing Co. (C. C.) 72 Fed. 579; Gluck & Becker on Receivers, supra. The application of the principle is very well enunciated by Simonton, Circuit Judge, in Machinery Co. v. Brewing Co., supra, as follows:

"In view, therefore, of the fact that the controversy in the suit in this court is entirely distinct from that in the state court, and that the scope and purpose of the proceedings in the state court are not those of the proceedings in this court, connected with the fact that the receiver heretofore appointed in the main cause is in actual, peaceable possession of the property, and that the complainant holds a legal lien on the property, entitling it to its possession through a receiver, the mortgagor being insolvent, and that this court has been asked by it not to exercise an act of discretion, but to give effect to a right secured to it by the Constitution and laws of the United States, the prayer of the petition cannot be granted; and it is so ordered."

These principles, in either aspect, we think determine the case against appellants. That the controversies involved by the two suits are not the same is perfectly manifest. It is a little difficult to say just what the purpose of the suit in the state court was. It is manifestly not a suit to wind out the business of the concern, dispose of its assets, and distribute its proceeds among those entitled thereto. On the other hand, it was evidently designed that the irrigation company should be maintained as a going concern, and that the system which it had promoted should be repaired and completed. It is shown that the company had squandered its funds, which are denominated trust funds, to which the purchasers were entitled for the repair, maintenance, and upkeep of the system, and in this connection it is alleged that the plaintiffs in said action and others similarly situated "had by virtue of the premises and by operation of law and equity a first and prior lien and claim upon all of the assets of every kind, character, and description" of the irrigation company, and that the lien of the trust deed of the complainants in the foreclosure suit was inferior in rank to theirs. But there is not a semblance of a purpose shown to enforce such purchasers' liens as such. At most, the suit could be

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construed only as one for the rehabilitation and reorganization of the irrigation company, and the readjustment of its affairs in that way so that the purchasers might reap the benefits of their purchases in pursuance of the original scheme for promoting and maintaining the irrigation system.

Now, it cannot be said that the suit in the state court is either an action in rem, suited to a disposal of the irrigation company's property, or one to enforce a lien, with the subjection of its property to the satisfaction thereof. Nor is it a suit to marshal assets for distribution among those entitled thereto, for such a thing was not contemplated. The only apparent object was that the affairs of the company might be administered for the time being under the supervision of the court for accomplishing the purposes of rehabilitation and reorganization. It is not such a suit that the full accomplishment of its purposes requires dominion and control over the res; so that, whether we apply the one principle or the other above ascertained, the trial court was right in maintaining possession of the res under its receivership.

We have not made mention of the bankruptcy matter, because it does not affect the result. The fact that a trustee in bankruptcy had been appointed and had taken possession of the res does not aid the complainants' possession in the foreclosure suit. It is only because the receiver in the federal court first obtained possession of the res that the court is entitled to maintain its jurisdiction respecting the same.

Affirmed.

(245 Fed. 86)

GREAT NORTHERN RY. CO. v. REID.

(Circuit Court of Appeals, Ninth Circuit. August 20, 1917. Rehearing Denied October 8, 1917.)

No. 2896.

1. RELEASE ⟹34—SCOPE—CONSTRUCTION.
   A release for personal injuries resulting from an accident will not cover personal injuries not in contemplation of the parties and then unknown to each, despite the greatest generality in language.

2. RELEASE ⟹57(2)—IMPEACHMENT—EVIDENCE.
   Where claim for personal injuries is released on settlement, the release cannot be impeached or set aside for fraud or mistake, except upon clear and convincing proofs.

3. RELEASE ⟹57(2)—EVIDENCE—SUFFICIENCY.
   In a suit to set aside a release given for personal injuries, evidence *held* to establish that, while there was no fraud in procuring the release, complainant had incurred injuries which were unknown to either of the parties, when the settlement was made, and hence to that extent to require setting aside of the release.

4. RELEASE ⟹16—VACATION—PARTIAL IMPEACHMENT.
   A release of personal injuries may be partially impeached, as where the injured party suffered injuries which, at the time the release was executed, were unknown to both.

5. RELEASE ⟹16—ANNULMENT—GROUNDS.
   Where complainant, who was injured, did not know that he had incurred inguinal hernia, but thought that the only serious injury was to his

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foot, his refusal, when examined by a physician, to remove his coat and exhibit a bruise on his arm and shoulder, does not estop him from impeaching his release on the ground that it did not include a release of claims for the hernia.

Appeal from the District Court of the United States for the Northern Division of the Eastern District of Washington; Frank H. Rudkin, Judge.

Suit by W. H. Reid against the Great Northern Railway Company. From a decree for complainant, defendant appeals. Affirmed.

The appellee herein, who was complainant below, was, on and prior to May 10, 1915, in the employ of the appellant, the Great Northern Railway Company, as a cook on one of its work trains. While the company was moving the car on which appellee was working about the switch, it was derailed, and he was thrown against the sink in the car. The top cover of the stove fell upon his right foot, and, withal, he received certain physical injuries. To recover damages for such injuries as he received, he instituted an action against the company. The company by its answer pleaded a release of liability executed by appellee. The release is in language following:

"Know all men by these presents, that in consideration of the sum of ten and no/100 dollars to me in hand paid by the Great Northern Railway Company, the receipt whereof is hereby acknowledged, have released, acquitted, and discharged, and do by these presents release, acquit, and discharge, said railway company, its successors and assigns, of and from any and all liability, causes of action, costs, charges, claims, or demands, of every name and nature, in any manner arising or growing out of, or to arise or grow out of, personal injuries received by me (W. J. Reid) at or near Geyser, in the state of Montana, on or about the 10th day of May, 1915, while acting as a cook, I met with an accident whereby I sustained personal injuries, or arising or to arise, out of any and all personal injuries sustained by me at any time or place while in the employ of said railway company prior to the date of these presents. No promise of future employment has been made to me by said railway company as part consideration of this settlement and release, or otherwise."

The back of the release contains an indorsement in appellee's handwriting, namely:

"I have red within Releas before signing and fully understand that the sum of ten dollars is in full settlement of all claim of every kind.

"W. J. Reid."

In addition, appellee signed a voucher which contained substantially this provision:

"For and in consideration of any and all claims, past, present, and prospective, against the Great Northern Railway Company, arising or to grow out of personal injuries received by me at or near Geyser, Montana, on or about May 10, 1915, $10.00."

For the purpose of having the release canceled, this suit was instituted against the company. Among other things, it is alleged, in effect, that appellee suffered the following injuries: A double inguinal hernia, a broken arch of the right foot, a severe wrench of the back, a severe shock to the nervous system, and, as resulting from such injuries, a semi-paralyzed condition of both legs; that on the same day the claim agent of the company took appellee to the office of its physician and surgeon, who, upon a cursory examination of appellee, informed him that his injuries were slight, and amounted to nothing more than a nervous shock and a slightly sprained ankle and instep, that he would be entirely recovered in a day or two, and that the claim agent would give him $10, representing two or three days' work, and would hold open his position for him; that appellee accepted the $10 from the claim agent, for no other purpose than as pay for his time, and signed the papers in question. It is further alleged that, at the time of signing the papers, appellee was not aware that he had broken the arch of his right foot, or had suffered double inguinal hernia, or any other injury which might

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cause any disability to his earning power, and that such or any injuries were never taken into consideration by him at the time of signing the documents in question, nor by the claim agent of the company.

The appellee's testimony is quite brief. He says:

"The trucks ran off the rails, and practically mashed the biggest part of the dishes. The top of the stove fell across my foot. and it threw me up bodily against the sink, which was near the side of the car, and it hurt me. I got hurt on my foot, and I was shaken up completely, my nerves, nervous shock, and I have been sick practically ever since. Worked a little off and on. * * * They took me to the doctor's office in an automobile; examined my foot, bound it up, and told me I was badly shaken up, and said, 'You will be all right to work to-morrow, if necessary.' Just examined my foot, that was all. * * * And after the doctor examined me the claim agent took me right up to his office. He asked me to sign some papers. I don't know what they was. I was too confused. I can't remember one thing I signed. or anything. Q. State what he said to you. A. Why, he said it was necessary to send these back to St. Paul. That is what he said to me. Q. Did he offer you any money? A. No; he said, 'You better take $10 for to get some liniment,' and something like that—$10 to get some liniment to rub on my feet. Q. Did he say anything to you about your working or anything? A. Yes; he did; said I could just stay around town two days and go back to work whenever I wanted to. I have stated everything that the doctor told me about my condition then. * * * I believed the statements made to me in regard to my condition by the doctor. * * * Q. When did you first know, Mr. Reid, that you had a double hernia? A. I don't know now. The next day; I didn't know what it was. I discovered something down there where it hurt. I had a very small rupture before on the right side, about the size of a marble. I had worn an elastic truss. Q. Had you ever been bothered with it? A. Never; part of the time I would leave it in bed—wouldn't use it. When I went from Geyser to Great Falls, my foot was swollen up, so it hurt me, and I cut my shoe right up there. It swelled up a bit; bandaged it up. I went back to work that same day, because the doctor told me there was nothing the matter with me."

As to the writing, he says he just looked it over; that he could not read very well, and just signed it as it was written, and that it was not read to him. On cross-examination, he testified that he had had a hernia on the right side for three years before the accident, and told how he came by it. As to the hernia on the left side, he said it did not bother him much—it was only a small one.

Dr. Downs, who examined appellee on February 26, 1916, states that Reid was suffering from a right and left inguinal hernia; was in a very nervous condition, and very poorly nourished; had a slight swelling in the right foot, which he found to be a flatfoot. The hernia on the right side was the larger one; the one on the left not so large—about the size of a walnut. The arch on his foot was flattened out and broken down. This condition generally prevailed as to his left foot.

Dr. Longeway, the company's physician, testified that he examined appellee on the day of the accident; that appellee told him he had a bruise about the shoulder and arm; that he examined his foot, and found that it was injured and bruised, and the ankle slightly sprained—and continued as follows: "He was walking on it; walked on it to the office. I asked him about his arm, and he said that didn't amount to anything. I asked him to take off his coat, and he said that didn't amount to anything; his injuries were not bad and he wouldn't take off his coat and let me examine it. He said that he would be all right; he was just bruised about the right arm and shoulder. Consequently he didn't take off his coat, and I didn't examine his arm. He said it didn't amount to anything and would be all right. I bandaged his foot and told him to stay around two or three days and let me watch him. 'No,' he said, 'it is all right.' He wanted to get right back to work, and he left my office, and that was the last I ever saw of him. His right foot then was practically the same as it is now, except it was more swollen around the ankle at that time than it is now. He had a pretty flat foot. * * *

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He didn't at that time complain to me about any hernia, or any other injury than these that I have testified to. * * * I didn't make any statement to him that he could go right back to work; that his injuries were slight. * * * I believed he would be all right in a few days."

P. B. Foley, the claim agent, testified that, after appellee had been to the doctor's office, Burton brought him into his office, and then as follows: "I asked him, 'Did the doctor look you over?' He said, 'Yes. sir.' I said, 'What did he tell you?' 'He said my ankle was sprained a little; said he thought it would be all right in a little while, and advised me to stay around a few days.' 'Well,' I said, 'I think you better do that.' I said, 'I think you better stay around here a few days and have the doctor attend you.' He says: 'No; I am anxious to get back to the job. I will be all right; it is a little sprain; I will be all right; I want to get back on the job.' I says, 'All right; suit yourself.' Then I said, 'Well, what do you want us to do for you?' He hesitated a little while, and he says: 'I don't know. I will only lose this day.' Then I says, 'Well, I would like to know what you want us to do for you in settlement, that is in the line of settlement.' He says. 'Well, how will $10 do?' 'Well,' I says, 'if that is what you want,' I says, 'it is all right.'" The release and other papers were then made out and signed. Burton corroborates this statement.

Dr. H. P. Marshall, who made a recent examination, found appellee suffering from arteriosclerosis, double inguinal hernia, and double flatfoot.

Charles S. Albert and Thomas Balmer, both of Spokane, Wash., for appellant.

N. E. Nuzum and R. W. Nuzum, both of Spokane, Wash., Harold N. Nuzum, of Los Angeles, Cal., and Arthur H. Steake, of Spokane, Wash., for appellee.

Before GILBERT and HUNT, Circuit Judges, and WOLVERTON, District Judge.

WOLVERTON, District Judge. [1] The question presented for decision is whether the release should be canceled for fraud or mistake. The release itself is as broad as it could be made, acquitting the company of all liability arising on account of the injuries received by appellee, whether then appearing or growing out of the same by development in the future, or arising or to arise out of any and all personal injuries sustained at any time or place while in the employ of the railway company prior to the date of the release. In such a release, however, the general language will be held not to include a particular injury, then unknown to both parties, of a character so serious as clearly to indicate that, if it had been known, the release would not have been signed. This was the conclusion reached in Lumley v. Wabash R. Co. (C. C. A. 6th Circuit) 76 Fed. 66, 22 C. C. A. 60. See, also, Tatman v. Philadelphia, B. & W. R. Co. (Del. Ch.) 85 Atl. 716.

[2, 3] From the testimony, it is perfectly apparent that there was no fraud whatever attending the transaction of giving the release. Considerable concern was manifested by the claim agent that the affair should be speedily closed, but the appellee suffered no disadvantage by reason thereof. The appellee had come to Great Falls, a distance of 40 miles, of his own accord, with a view to getting relief of some sort from the company for his injuries. Having met Burton, he was taken to the office of the company's physician, and, after examination, repaired to the claim agent's office, where the release was

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soon signed. That he understood what he was signing, and the nature and purpose thereof, can scarcely be gainsaid. It is evident that he believed he was but slightly hurt, and was seemingly anxious to get back to his work, and, so believing, he was willing to accept $10 and acquit the company of further liability.

Whether he knew and understood the full nature and extent of the real injuries sustained is the vital question for consideration. The proofs fall far short of substantiating the complaint as to the nature and extent of his injuries, and at present, according to the medical experts, his physical afflictions consist of arteriosclerosis, double inguinal hernia, and double flatfoot. It is not at all probable that the first of these conditions was superinduced by the accident. The evidence does not, in any substantial way, indicate that such was the case. The third, namely, double flatfoot, existed prior to the accident, and was not caused thereby, while as to the right foot the condition may have been, and probably was, somewhat aggravated. As to the hernia, he had been so afflicted upon the right side for the space of three years, and thus far the accident has not contributed consequentially to his ailment. The hernia upon his left side had not developed prior to the accident. The first indication that he had of its existence was the next day, when he says he "discovered something down there where it hurt." Later, however, the trouble became well defined, and on February 26, 1916, when he was examined by Dr. Downs, it was about the size of a walnut. It further appears, however, that at the time of the trial appellee's body was poorly nourished, and that his general health and physical condition were far from good. Such was not the case to the same degree at the time of the accident, for he was doing his work, with some inconvenience only in getting about on account of his feet.

The rule unquestionably applies to settlements of the kind here involved that they neither can nor ought to be impeached and set aside for fraud or mistake, except upon clear and convincing proofs. Chicago & N. W. Ry. Co. v. Wilcox, 116 Fed. 913, 54 C. C. A. 147. Has the appellee met the exigency? For upon him was devolved the burden of so impeaching the release.

As we have seen, no conceivable fraud has been established. That appellee did receive a shock from being thrown against the sink, resulting in some distress to himself, can scarcely be questioned. At that time he was not afflicted with an inguinal hernia on his left side. The following day he experienced pain in that region of his person, and later the hernia developed, so that it became well defined. That he was so afflicted on February 26, 1916, is shown by Dr. Downs, who is corroborated in this by Dr. Longeway and Dr. Marshall. So it appears reasonably clear and certain that the development of this particular trouble began at least about the time of the accident, and that he was then afflicted in a way that was not known to him, and which for that reason was not disclosed to the physician, and consequently not taken into consideration when he settled with the claim agent and gave the release. We think that, under the authorities, there is here sufficient to impeach

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the settlement in so far as it relates to this phase of the controversy, and to that extent the release should be set aside.

[4] We agree with the court below that it should not be disturbed as it respects the injury to his foot. Lumley v. Wabash R. Co., supra, is authority for the partial impeachment of the release. Upon the general question of annulling such a release, see, further, Great Northern Ry. Co. v. Fowler, 136 Fed. 118, 69 C. C. A. 106, where the authorities are aptly and clearly discussed and distinguished; also Tatman v. Phil., B. & W. R. Co., supra.

[5] Another contention of appellant is that appellee is estopped from urging the annulment of the release on the ground that he refused to remove his clothing, so that the physican might examine his arm and shoulder, which appellee seemed to think were injured somewhat. That particular supposed injury, however, was not taken into account at the time of the settlement, and no question is made of it in this proceeding, and the incident is not of sufficient consequential importance to base an estoppel upon it against inquiry as to the real injuries sustained.

Decree affirmed.

(245 Fed. 91)

AMERICAN PRESS ASS'N et al. v. UNITED STATES et al.

(Circuit Court of Appeals, Seventh Circuit. August 25, 1917.)

Nos. 2509, 2510.

MONOPOLIES ⟹12(1)—SELLING LOSING BUSINESS—SHERMAN LAW.

A concern which is going out of business, because it cannot conduct it without loss, may without violation of the Sherman Anti-Trust Law (Act July 2, 1890, c. 647, 26 Stat. 209) sell its plant as a going concern to its only competitor, there being no other prospective purchaser, instead of disposing of it as junk; this not injuring the public, but being to its advantage, as well as that of the seller; the buyer being required to continue fair dealing with the public.

Appeals from the District Court of the United States for the Northern District of Illinois.

Suit by the United States against the American Press Association and others. From decrees dismissing the petition and auxiliary bill of the American Press Association, certain parties appeal. Reversed in part, with direction, and in part dismissed.

Charles E. Hughes, of New York City, for appellants.

Henry S. Mitchell, of Washington, D. C., for appellees.

Before BAKER and ALSCHULER, Circuit Judges, and HUMPHREY, District Judge.

BAKER, Circuit Judge. On August 3, 1912, the United States began a suit against the American Press Association, a corporation, the Western Newspaper Union, a corporation, and others, engaged in furnishing country newspapers with stereotype plates and ready-print service, to enjoin the continuance of acts alleged to be in viola-

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tion of the Sherman Anti-Trust Law. A consent decree was entered the same day. Among other prohibitions, the Western Newspaper Union was permanently enjoined:

"(a) From combining or attempting to combine with the American Press Association, either by purchase, stock ownership, or in any other manner: * * * (c) from selling any of its product or services at less than a fair and reasonable profit, or at cost, or less than cost, with the pupose or intent of injuring or destroying the interstate trade and commerce of the American Press Association or of any other competitors."

On May 9, 1917, the American Press Association filed a petition in the original suit, setting forth changes in condition, on account of which it prayed for a modification of provision (a). To this petition all the parties appeared, evidence was heard, and the court found:

"That the facts set forth in the petition and the evidence introduced to support the same are immaterial; that it is contrary to the whole spirit and purpose of the Sherman Law to authorize one competitor to absorb another competitor, regardless of whether such competitor is able to continue in business or not; and that the sale of such assets and business by the American Press Association to the Western Newspaper Union would be in violation of the Sherman Law."

And thereupon the court decreed that the petition be denied. Cause No. 2509 is an appeal from that decree.

Shortly after presenting the above-mentioned petition, the American Press Association filed an "auxiliary bill," setting forth the same facts and asking the same relief. Parties other than the United States appeared and answered; and the United States filed a motion to dismiss, on the ground that it could not be sued by a private party without its consent. Without passing on the motion, the court dismissed the bill, for the same reasons on which the petition was denied. Cause No. 2510 is an appeal from the decree dismissing the auxiliary bill.

Whether under the stated circumstances the United States may be sued, and whether the auxiliary bill was a proper method of invoking relief, are questions that are now moot, we believe, because the identical controversy respecting facts and law, between the identical parties, was fully heard and determined on the petition in the original suit.

Facts pleaded and proved, so far as necessary for a decision, are briefly these: In 1912 the American Press Association had about 5 per cent. of the ready-print business. But it did not furnish advertisements to the country newspapers with its ready-print service, whereas the Western Newspaper Union did. The result, down to January, 1917, was that the Western Newspaper Union could and did supply ready-print at lower rates than the American Press Association could stand without loss; and the ready-print business of the latter has fallen to less than 1 per cent. In 1912 the American Press Association had a large part of the stereotype plate business. But its plate business had to bear substantially all the overhead expenses, while the Western Newspaper Union's ready-print service could carry the overhead and leave its plate business as a profitable by-product. In January, 1917, the Western Newspaper Union reduced its price on miscellaneous plate matter by one-fourth and on serials by one-third. On the American Press Association's complaint that provision (c) of

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the injunction was being violated, the Department of Justice investigated and correctly found that there was no violation.

Since the outbreak of the world war there has been an increasing scarcity of print paper, and mounting prices. Few new country newspapers are being started; many have reduced their sizes; quite a number have quit. This condition brought the American Press Association's plate business to a loss of over $3,000 a month, which is progressively increasing, and has also made it impossible for that company to build a ready-print business to help bear the overhead. The directors have decided to wind up the plate business as speedily as possible, whatever may be the outcome of this proceeding. They are continuing it at a loss while the question is being determined whether they must dispose of their plate plant as junk, or whether they may sell it as a going concern to the Western Newspaper Union, for the latter is the only probable bidder. No one now outside the business would be likely to buy a demonstrated loss. But to the Western Newspaper Union the plant may have more than junk value. If the plant is broken up, the newspapers now being served thereby may have to go to the Western Newspaper Union as the only concern left in the business; and it might be more economical for that company to buy an existing plant than to enlarge its own or build a new one. At the same time it is evident that, if the plant is disintegrated, the newspapers now looking to it would suffer inconvenience and loss while arranging to obtain other service.

What is the application of the Sherman Law to these facts? Not every joinder of competing businesses or acquisition of instrumentalities that have been used in competition is an undue restraint of trade or a creation of a monopoly. Each situation must be measured by the rule of reason. And a fundamental test is injury to the public. If it were not for provision (a) of the decree, and the law back of it, these two companies might get together and fix a price that would provide a reasonable profit to the American company and an unreasonable one to the Western. For the newspapers, and through them the public, to pay for the profitable operation of an inefficient concern is an injury. And a combination to that end would be an unreasonable restraint of trade. That course cannot be pursued. And, because it cannot, the American company is forced to go out of the plate business. No decree can stop that. And after the American company quits, if the Western is left alone in the field, the ultimate situation of the country newspapers would be the same whether the plant be scrapped or sold as an integer. Neither the decree nor, in our judgment, the Sherman Law, prevents the Western from buying the scraps piecemeal. If it did buy, it could organize them anew. If it be permitted to buy the integer, it would save the expense of reorganization. If the plant be scrapped, two injuries result: One to the public from the destruction of a usable and useful plant; the other to the stockholders of the American company.

As to the first, a law designed to shield the public from injury should not be construed to compel the public to suffer an injury. As to the second, the Sherman Law, in our opinion, does not require the stock-

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holders of a company, even a company that was a self-confessed wrongdoer in 1912, to sustain a loss in 1917 arising without wrongdoing, if that loss can be prevented without injury to the public. Injury can be prevented, we believe, by attaching to the permission to buy the plant as a going concern a condition which should be read in the light of provision (c) of the injunction. Within common knowledge one of the evils at which the Sherman Law was aimed was the acts of monopolizers in killing competitors, by selling at less than cost of production and then mulcting the public for the expense of the campaign with undue profits added. For practices of that kind during and prior to 1912 the Western Newspaper Union was put under the continuing prohibition of provision (c). Since 1912 it has not charged less than cost plus a fair and reasonable profit. On the other hand, the record, at least inferentially, demonstrates that it has not exacted more than cost plus a fair and reasonable profit. If it continues in the same even tenor of fairness, if it refrains from putting up prices that would incite outside capital to unneeded offers of like service and then killing competition by underselling at a loss, to be recouped by fixing unwarranted prices again, we perceive no reason why it should not be permitted to buy the plant as a going concern.

In No. 2509 the decree denying the petition is reversed, with direction to enter a decree, supplemental to the original decree, authorizing the Western Newspaper Union to be a bidder and purchaser at a sale by the American Press Association of its plate plant and business as a going concern, on the condition and under the prohibition that the Western Newspaper Union shall not employ the plant and business so purchased, or use the situation created by such purchase, to charge more for its plate service to newspaper publishers than cost of production plus a fair and reasonable profit, such fair and reasonable profit to be measured relatively by the range of annual profit obtained by the Western Newspaper Union from its plate business since the entry of the original decree of August 3, 1912, without, however, depriving the purchaser of such profits as result from its purchase by reason of the increase of business and the economies in the cost of production following the same; provided that present prices for plate service to newspaper publishers shall not be increased, unless, but not longer than, an increase is warranted by increase in cost factors.

In No. 2510, the appeal is dismissed, without taxation of costs, in favor of appellees.

(245 Fed. 94)

CITY OF PORT WASHINGTON v. THACHER.

(Circuit Court of Appeals, Seventh Circuit. July 27, 1917.)

No. 2438.

1. CONTRACTS ⟹322(2)—PERFORMANCE—EVIDENCE.

In an action for damages for breach of contract providing for the laying of an intake pipe extending into Lake Michigan 2,800 feet, plaintiff contractor might, where the city claimed that by reason of defects in the pipe water close to the shore entered the pipe, show that the number of bac-

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teria in a given quantity of water from the pipe corresponded with the number of bacteria found in that amount of water at a distance of 2,800 feet from the shore, having shown that a greater number of bacteria were found in water close to the shore.

2. EVIDENCE ⟹553(2)—OPINION EVIDENCE—HYPOTHETICAL QUESTIONS.
In framing hypothetical questions to expert witnesses, a party may disregard his adversary's theory and apply only his own.

3. CONTRACTS ⟹323(1)—PERFORMANCE—TEST.
Where a municipality engaged a contractor to construct an intake at a considerable distance in a lake for the purpose of obtaining water of unquestioned purity, the fact that some three years after construction, during which time the intake and pipes had been used continuously, leaks appeared in the pipe, does not warrant direction of verdict for defendant, on the ground that the contractor did not comply with the terms of the contract, even though the test prescribed was not followed, there being no agreement by the contractor to make the test, and so the question should be left to the jury.

4. CONTRACTS ⟹323(2)—CONSTRUCTION FOR COURT—QUESTION.
The construction of the contract, where facts were not in dispute, was for the court.

5. CONTRACTS ⟹280(1)—COMPLIANCE—WHAT CONSTITUTES.
Where a contract for the construction of an intake and laying of pipe in a lake, from which the municipality expected to derive a supply of pure water, provided that the pipe should for 800 feet from the shore be buried in the bed of the lake to a depth of 1 foot, the dredging of a trench 12 inches deep, in which the pipe was laid, so that it was even with the bed of the lake, does not show compliance with the contract, warranting recovery for that item.

In Error to the District Court of the United States for the Eastern District of Wisconsin.

Action by Addison Q. Thacher against the City of Port Washington. There was a judgment for plaintiff, and defendant brings error. Affirmed, on condition that plaintiff enter remittitur; otherwise, reversed and remanded.

Action at law to recover damages arising out of express contract. Verdict and judgment for the plaintiff.

Plaintiff in error, herein called the defendant, entered into a contract with defendant in error, herein called the plaintiff, for the laying of an intake extending into Lake Michigan 2,800 feet, for which the defendant was to pay $10,900, and an additional sum for digging an 800-foot trench as designated, at the rate of $1.37½ per foot. The city engaged a consulting engineer, and employed one Doyle, since deceased, as inspector. Work was begun in April and continued until the fore part of September, 1907. Upon complaint being made, plaintiff returned in October and repaired some defective pipes; the defects consisting of cracks or breaks in certain parts of the pipe. After October, 1907, defendant used the intake continuously, but complained of leaks, and that much sand appeared.

The city made numerous demands upon the plaintiff in 1908 and 1909 to complete the contract according to its terms. In 1900 the city engineer notified plaintiff that the work must be done before August, 1909, or the city would make the repairs itself. Plaintiff insisted that the work was a substantial compliance with the contract. On September 11, 1911, a formal resolution was passed by the defendant, declaring the plaintiff to have abandoned the contract and providing for completion of the work by the city. Shortly thereafter plaintiff appeared with divers to repair any defects, but the city ordered him away. Thereafter the city proceeded to repair the pipe, and found joints disconnected and numerous cracks in the pipe. Its bill for material and services rendered, etc., aggregated $3,873.59.

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The specifications contained the following provision: "When the intake has been completely laid, but before the trench has been filled, the pipe shall be tested with compressed air at a pressure of 100 pounds per square inch; during the test all joints shall be examined by a diver, and all found to be leaking shall be repaired, and broken pipes shall be removed and replaced by perfect lengths." No air pressure test was made by the city in 1907, but a water pressure test was attempted, and breaks and cracks were discovered, which plaintiff claims were shortly thereafter remedied. An air pressure test was made by the plaintiff in October, 1907, but there is conflict of testimony as to the results.

The contract provided for extra pay for digging a trench as follows: "And in addition thereto, the sum of $1.37½ per foot for each foot of pipe buried to a depth of one foot beyond the 400 feet specified in said plans and specifications." And again it reads at another place: "* * * And in addition thereto to bury said intake to the depth of one foot for a distance of eight hundred feet." The specifications covering the same subject-matter provided: "Before any pipe is laid, a trench shall be dredged so as to give the pipe a cover of one foot where the water is ten feet deep," etc. A trench in which 800 feet of pipe was laid was dug; the top of the pipe being left level with the lake bottom.

Upon the trial, the court submitted to the jury the issues of substantial compliance and damages. Other statement of facts will appear in the opinion. Plaintiff in error contends the court erred in (a) admitting evidence; (b) in refusing to direct a verdict; and (c) in refusing to grant defendant's motion for judgment notwithstanding the verdict or for a new trial.

Joseph B. Doe, of Milwaukee, Wis., for plaintiff in error.

Albert K. Stebbins, of Milwaukee, Wis., for defendant in error.

Before KOHLSAAT, ALSCHULER, and EVANS, Circuit Judges.

EVANS, Circuit Judge (after stating the facts as above). [1] Error is assigned because the court received evidence over defendant's objection showing the number of bacteria found in the water at various places. In order to show the cracks in the pipe, if any, were insignificant or trivial, plaintiff made certain tests. He ascertained the number of bacteria in a given quantity of water 700 feet, 1,400 feet, 2,100 feet, and 2,800 feet from shore. Tests were also made to determine the number of bacteria in the same amount of water at certain places in the city. It appeared that the number of bacteria decreased, the further one went out into the lake. It also appeared that the number of bacteria found in the water in the city corresponded to the number of bacteria found in the same quantity of water 2,800 feet from shore. In support of this testimony it was claimed that, if the pipe was leaking badly, that fact would be disclosed by these experiments; for, if the water entered the pipe 700 feet from shore, it would have a great many more bacteria than if it entered the pipe through the intake 2,800 feet from shore. While not at all conclusive, we think the evidence was relevant and instructive, and bore upon the issue of substantial compliance.

[2] Error is also assigned because of the admission of evidence over defendant's objection, and given in response to hypothetical questions dealing with the length of time ordinarily or reasonably required to do certain work. This evidence bore upon the reasonableness of the amounts claimed by the city to have been necessarily expended in repairing the intake. No error was committed by the learned trial court

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in permitting the plaintiff to submit hypothetical questions to his expert witnesses on his own theory. A party is not required, in framing hypothetical questions to adopt his adversary's version of the case. Jones on Evidence, 903.

[3] Error is assigned because the court erred in refusing to direct a verdict for defendant. In support of this motion defendant contended that plaintiff's completed work failed to meet the tests provided in the contract and was not a substantial compliance therewith. Plaintiff in error was seeking to secure a water supply of unquestionable purity, and it was entitled to an intake well-nigh perfect, and one which would meet any test that the parties saw fit to make. Appreciating this purpose, and the necessity of strict compliance with the terms of the contract, the court was justified in examining alleged imperfections with the closest scrutiny.

On the other hand, it must be borne in mind that the pipes were laid in water of considerable depth, and no test in the method designated was made by the city until some three years had elapsed from the date when the city took over the work. It should also be borne in mind that the city had an engineer to supervise the work and a man constantly on the job to see that it was properly done and in accordance with the specifications. While the contract called for the air test, it did not provide that the test should be made by the plaintiff. Defendant was never precluded from making the test called for by the contract. It used the intake continuously from October, 1907, and was at all times in position to determine whether the completed work answered the calls of the contract. A test or examination made some two or three years after the intake was completed, and when imperfections might be traced to causes other than those attributable to the plaintiff, was not conclusive. Upon all the evidence, we are of the opinion that the motion to direct a verdict in defendant's favor was properly denied.

[4, 5] Error is also assigned because the court refused to set aside the verdict and to grant a new trial, because the verdict was excessive. Many of the figures are not in dispute, and, accepting plaintiff's statement of the account, it is impossible to sustain the finding of the jury, except by allowing $1,100 for burying the 800 feet of pipe. In fact, plaintiff in his brief says:

> "The jury unquestionably have allowed plaintiff $1,100 for burying the pipe. * * * It is evident, also, that the trial judge considered that it was an item concerning which the jury should find for the plaintiff."

The figures amply support this statement. The amount paid plaintiff while the work was in progress was $5.717.69. The city paid for repairs, etc., $3,873.59. The verdict of the jury was $3,482.31. These three items make a total of $13,073.59. Exclusive of the item of $1,100 for the 800 feet of trench, the amount due plaintiff was $10,900. This would indicate an overpayment on this basis of $2,173.59.

However, plaintiff contends that the item of $3,873.59 should be reduced, because the evidence warranted the jury in finding that a considerable portion of this item was unreasonable. But if we take from this aggregate of sums actually paid out by defendant such sums as the plaintiff contends should be deducted. we are still unable to account

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for the difference of $2,173.59. Viewing the figures from every viewpoint, it is impossible to reach any other conclusion than that stated by counsel for plaintiff in his brief and set forth above. The jury allowed plaintiff $1.100 for burying the pipe. This item should never have been left to the jury to determine. The facts are not in dispute, and it was for the court to construe the contract. The trench in which the pipes were laid was 12 inches deep. The contract and specifications called for the pipe being covered one foot. It follows that the allowance of this item of $1,100 was error.

But plaintiff was entitled to recover, and was erroneously denied, interest on $2,382.31 from November 10, 1910, the date fixed in his bill, to the rendition of the judgment. The legal rate being 6 per cent. in Wisconsin, this interest was $771.38. The difference between the $1,-100 erroneously allowed by the jury and the interest item is $328.62.

It is therefore ordered that, if the defendant in error, within 20 days after this opinion is announced, file a remittitur for $328.62 in the office of the clerk of the District Court of the United States for the Eastern District of Wisconsin, and a certified copy thereof in the office of the clerk of this court, the judgment, less the amount so remitted, will be affirmed, with costs of this court to the plaintiff in error; but, if this is not done, judgment will be reversed. with costs to the plaintiff in error. and with directions to grant a new trial.

(245 Fed. 98)

BANDY v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. September 3, 1917.)

No. 4897.

1. CRIMINAL LAW ⟹1129(2)—APPEAL—ASSIGNMENTS—COMPLIANCE WITH RULE.
   Assignments of error, framed in disregard of the rules of the Circuit Court of Appeals, may be disregarded.
2. CRIMINAL LAW ⟹1129(3)—APPEAL—ASSIGNMENTS OF ERROR.
   An assignment of error, complaining of the admission of evidence, which did not set forth the evidence admitted, presents nothing for review.
3. CRIMINAL LAW ⟹1178—APPEAL—ASSIGNMENTS OF ERROR—WAIVER.
   Assignments of error, not argued, are waived.
4. CRIMINAL LAW ⟹1129(3)—APPEAL—ASSIGNMENTS OF ERROR—SUFFICIENCY.
   Assignments of error, complaining of instructions, which did not set forth the instructions complained of, present nothing for review.
5. CRIMINAL LAW ⟹1129(1)—APPEAL—ASSIGNMENTS OF ERROR—EXCEPTIONS.
   An exception to a charge, though not properly assigned as error, may be considered in a case involving personal liberty.
6. CRIMINAL LAW ⟹823(9)—INSTRUCTIONS—BURDEN OF PROOF.
   Where the court correctly charged the jury on the question of reasonable doubt, a charge, in a prosecution for introducing into the state of Oklahoma intoxicating liquor, that if it was a witness who introduced the liquor, and defendant had no interest in or connection therewith, he should be acquitted, is not improper, as placing the burden of proof on defendant.

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7. COURTS ⟹337—FEDERAL COURTS—PROCEDURE.
Except where Congress has made specific provision, the common law governs the procedure in criminal trials in federal courts; and, no such provision being made, a local state statute as to accomplice testimony is inapplicable to a prosecution in the federal court.

8. CRIMINAL LAW ⟹780(3)—TRIAL—INSTRUCTION—ACCOMPLICE TESTIMONY.
In a prosecution for introducing intoxicating liquors into the state of Oklahoma, the court charged that if, from the testimony of a witness and other testimony, the jury should find that the witness had some interest in introducing the liquor into the state, or in its transportation, and that he was knowingly assisting in violation of the law, so as to become an accomplice, then his testimony should be carefully scrutinized, and should be corroborated, sufficiently protected the rights of accused; Rev. Laws Okl. 1910, § 5884, declaring that a conviction cannot be had on the testimony of an accomplice, unless he be corroborated by other evidence tending to connect defendant with the commission of the offense, and that the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances, not applying, the prosecution being governed by the rules of the common law.

9. CRIMINAL LAW ⟹1159(3)—APPEAL—VERDICT.
A conviction on conflicting evidence will not be disturbed on writ of error.

In Error to the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

O. E. Bandy was convicted of introducing and carrying into the state of Oklahoma intoxicating liquor from without the state, and he brings error. Affirmed.

F. E. Kennamer and Charles A. Coakley, both of Madill, Okl., for plaintiff in error.

Archibald Bonds, Sp. Asst. U. S. Atty., of Muskogee, Okl. (W. P. McGinnis, U. S. Atty., of Muskogee, Okl., on the brief), for the United States.

Before SANBORN and CARLAND, Circuit Judges, and BOOTH, District Judge.

CARLAND, Circuit Judge. [1] This is an indictment for introducing and carrying into the state of Oklahoma intoxicating liquor from without said state. The defendant was convicted, and now brings the case here on writ of error. The assignments of error were framed with entire disregard of our rule 24, and for this reason might be disregarded.

[2, 3] Taking up the assignments of error in their order, it may be said that assignment No. 1 presents nothing for review, as the evidence admitted is not set out, and the question attempted to be raised is not argued. Assignments Nos. 2 and 3 present nothing for discussion, as the defendant introduced testimony after the ruling complained of was made, and thereby waived his motion.

[4] The instructions complained of in No. 4 are not set out, and the assignment presents nothing for review. The exceptions that were taken to the charge as given will be hereafter referred to. Assignment No. 5 does not set out the charge requested and refused, and no exceptions were taken to the refusal to give any requested instruction.

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Assignments Nos. 6 and 7 alone present questions for consideration. The following are the only exceptions to the charge of the court as given:

"Mr. Coakley: The defendant excepts to that part of the charge following the charge on reasonable doubt, for the reason that the statement as given in the charge throws the burden upon the defendant, instead of placing it upon the government, to prove the case. And further excepts to that part of the charge which predicates the case upon the whisky having been caused to be carried into the Eastern district of Oklahoma.

"The Court: Exceptions noted."

[5, 6] By referring to the charge we can spell out what is meant by the first clause of the above exceptions. The last clause is unintelligible. The exception contained in the first clause is not properly assigned as error, but in a case involving personal liberty we will consider it. The portion of the charge to which exception was taken reads as follows:

"Now, with regard to the evidence of one of the witnesses for the government, the witness Beck: You have heard this witness' testimony. Of course, if you believe, from his testimony and from all the evidence in this case, that it was he who introduced this liquor, and that the defendant Bandy had no interest in or connection with it at all, then, of course, you must find the defendant Bandy not guilty."

It was the theory of the defendant that the witness Beck introduced the liquor. It is therefore claimed that the above excerpt from the charge placed the burden of proof upon the defendant. Taking the whole charge of the court together, however, there is no merit in this contention. The jury was properly instructed upon the question of reasonable doubt.

[7, 8] Counsel for defendant requested the court to charge as follows:

"(5) You are instructed that under the testimony of the witness C. T. Beck he is an accomplice in the crime of introducing liquor charged herein, if such crime was committed, and you cannot convict the defendant upon the testimony of said Beck alone, unless you find his testimony corroborated by other evidence in the case, tending to connect the defendant with the commission of the crime.

"(6) If you find from the evidence that the witnes C. T. Beck was interested in the liquor for which introduction is charged in this case, or was interested in its introduction, then the said C. T. Beck would be an accomplice, and you cannot convict the defendant, O. E. Bandy, upon the testimony of said C. T. Beck, unless you find the testimony of said Beck corroborated by other testimony in the case tending to connect the defendant with the commission of the crime.

"(7) If you find from the evidence that the witness C. T. Beck was aiding and abetting the defendant or any other person in introducing the liquor in question into the Eastern district of Oklahoma, then the said C. T. Beck would be an accomplice, and you cannot convict the defendant upon the testimony of said C. T. Beck, unless you find such testimony corroborated by other testimony in the case tending to connect the defendant with the commission of the crime."

The record shows that these requests were not given as requested, but does not show that they were refused, except by inference, or that any exception was taken to the refusal to give the same, nor is the refusal to give them properly assigned as error; but for reasons stated we

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will consider the requests to charge, above mentioned. The court, upon the question of accomplice, charged the jury as follows:

"If from the testimony of the witness Beck, and other testimony in the case, you arrive at a conclusion that Beck had some interest in introducing this liquor, or carrying it from Denison up to Madill, and that he had some knowing guilty connection with it, or some interest in it, was assisting in it in any way, assisting knowingly in this violation of the law, then he would be what is known as an accomplice in this affair; and if the evidence shows him to be such accomplice, then his testimony in regard to the connection of the defendant, Bandy, with the transaction, should be carefully scrutinized by you. And it should also be corroborated in some material point or points connecting Bandy with this offense by other credible evidence in the case, aside from the evidence of the witness Beck himself."

Counsel for defendant complains that the trial court did not charge the law as found in section 5884, Rev. Laws Okl. 1910, which reads as follows:

"A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof."

The law of the state of Oklahoma, however, was not applicable to a criminal case being tried in a federal court. Except so far as Congress has made specific provisions upon the subject, the common law governs the procedure in criminal trials in the courts of the United States. United States v. Reid, 12 How. 361, 13 L. Ed. 1023; United States v. Central Vt. Ry. (C. C.) 157 Fed. 291; Bucher v. Cheshire R. Co., 125 U. S. 555, 8 Sup. Ct. 974, 31 L. Ed. 795; Logan v. United States, 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429; Hanley et al. v. United States, 123 Fed. 849, 59 C. C. A. 153; Diggs et al. v. United States, 220 Fed. 545, 136 C. C. A. 147; Mark Yick Hee v. United States, 223 Fed. 732, 139 C. C. A. 262.

In the case of Hanley et al. v. United States, supra, it was decided that a state statute requiring corroboration of the testimony of an accomplice in a criminal case is not applicable to a prosecution in a federal court, and that a defendant in a criminal case in a federal court cannot complain because the testimony of an accomplice was submitted to the jury, under instructions that it should be received with caution, and carefully scrutinized, and which in effect authorized the jury to give it full credit only in case they found it corroborated as to material facts. The charge as given was as favorable to the accused as he was entitled to under the rule of the common law. As we have said before, there was no exception to the refusal of the court to instruct the jury to find the defendant not guilty; but we have read the evidence in the record, and are satisfied there was no error in refusing to so instruct.

[8] It is claimed that there was no evidence to show that Denison, from which town the intoxicating liquor was alleged to have been carried to Madill, in the state of Oklahoma, was in the state of Texas. Aside from the facts of which the court was entitled to take judicial notice, there was the testimony of Stuart, the train conductor, who testified that on February 11, 1916, he was a conductor, on a Frisco train running from Denison, Tex., to Madill, Okl. It is next claimed that

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there was no evidence that the liquor was on this train. But, conceding this fact, it does not destroy the statement of the conductor that the town of Denison was in the state of Texas. It is further claimed that the evidence showed that the witness Beck, rather than Bandy, was the guilty man; but that was, under the evidence, a question for the jury, and they have found that the defendant, Bandy, was the guilty man.

There was evidence to sustain the verdict, and the judgment below is therefore affirmed.

(245 Fed. 102)

MASSES PUB. CO. v. PATTEN.

(Circuit Court of Appeals, Second Circuit. August 6, 1917.)

1. COURTS ⟹405(15)—CIRCUIT COURT OF APPEALS—STAY OF INJUNCTION—AUTHORITY OF COURT.

   Under Judicial Code (Act March 3, 1911, c. 231) § 129, 36 Stat. 1134 (Comp. St. 1916, § 1121), declaring that where, upon a hearing in equity in a District Court, an injunction shall be continued, refused, or dissolved, an appeal may be taken from such order to the Circuit Court of Appeals, but that the proceedings in other respects in the court below shall not be stayed, unless otherwise ordered by that court or by the appellate court, a judge of the Circuit Court of Appeals may, on appeal from an order granting an injunction pendente lite, stay the operation of the same.

2. INJUNCTION ⟹75—SUBJECT OF RELIEF.

   Equity has jurisdiction to grant an injunction against an order of the Postmaster General excluding a publication from the mails, solely to prevent irreparable pecuniary damage.

3. INJUNCTION ⟹75—ACTIONS—NATURE OF ACTION.

   An action against a postmaster to enjoin him from excluding a publication from the mails, pursuant to the direction of the Postmaster General, is not technically one against the sovereign.

4. COURTS ⟹405(15)—CIRCUIT COURT OF APPEALS—STAY OF INJUNCTION—PROPRIETY.

   Plaintiff sued to prevent defendant postmaster from excluding his publication from the mails, pursuant to the order of the Postmaster General. Before decision was rendered in the District Court, plaintiff requested defendant to return the withheld magazines; other arrangements for distribution having been made. Plaintiff's bill, however, was not withdrawn. *Held* that, on appeal from an order granting an injunction pendente lite restraining defendant from excluding plaintiff's publication from the mails, the operation of the injunction should be stayed on application to a judge of the Circuit Court of Appeals, for plaintiff's bill still sought substantial relief, and, if effect should be given to the injunction, the question would become moot, for the controversy continued only so long as plaintiff's publications were excluded from the mails.

5. INJUNCTION ⟹75—ISSUANCE—RIGHT TO ISSUE.

   The courts will not by injunction interfere, except in the clearest cases, with the action of the great executive departments of the government in interpreting laws affecting the government.

6. POST OFFICE ⟹22—MAILS—CARRIERS.

   In respect to the mails, the United States is not a common carrier, but is pursuing a high governmental duty, and it is at least questionable whether the government can be judicially compelled to assist in the dissemination and distribution of a publication which proclaims itself revolutionary.

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7. APPEAL AND ERROR ⟹458(3)—STAY OF INJUNCTION—EXCLUSION OF MAIL MATTER.

Plaintiff's publication asserted that laws passed by the United States for the creation of military forces, and the prosecution of war violated the fundamental rights of any free people, that conscription is the destruction of youth, democracy, and labor, and the desolation of the family, and that the United States has attempted to ensnare Russia into a continuance of war for purposes prejudicial to true democracy, and that persons who have denied and resisted the laws, having military success as their object, are worthy of admiration and possible emulation. The publication, however, did not urge resistance to the laws. Act June 15, 1917, forbids any one from willfully causing insubordination, disloyalty, mutiny, or refusal of duty in the military and naval forces of the United States. *Held* that, though plaintiff's publication did not expressly urge resistance to conscription, nevertheless, as it tended in that direction, and articles tending to arouse insubordination and disloyalty in the military and naval forces are unmailable, an order enjoining a postmaster from giving effect to the order of the Postmaster General excluding plaintiff's publication from the mails should be stayed, an appeal having been taken to the Circuit Court of Appeals, for plaintiff, having secured other means of distribution, could be compensated by pecuniary damages, and public interest demands protection against seditious articles.

Appeal from the District Court of the United States for the Southern District of New York.

Suit by the Masses Publishing Company against Thomas G. Patten. From an order granting an injunction pendente lite, defendant appeals. On motion to stay injunction. Stay continued.

See, also, 244 Fed. 535.

E. B. Barnes, Asst. U. S. Atty., of New York City, for the motion.

G. E. Roe, of New York City, opposed.

Before HOUGH, Circuit Judge.

HOUGH, Circuit Judge. This motion will be considered under the following heads: I. The practice under the statute. II. The present condition of this litigation as to its object and subject-matter. III. The fact findings of the District Court, and the conclusions there drawn therefrom. IV. The law as suggested to me by those facts. V. The propriety of this motion under the circumstances thus developed, in respect of (1) the rights of parties; (2) the public interests.

[1] I. After considerable experience in appellate practice, and such recent inquiry as I have been able to make, no other instance (under section 129, Judicial Code) of application to a judge of the appellate court to stay an appealed order of this nature is known to me. Such stays, granted by the trial judge, are not uncommon; I have, myself, awarded not a few. They rest on the belief that doubtful questions of law, or difficult contests of fact (or both) are presented by the record, and that the relations of the parties, or exigencies of business are such that (perhaps by the giving of security) no injury will result from letting matters remain in statu quo (except for opinion filed) until decisive action can be had in the Court of Appeals.

There can be no difference in principle, between such an application to the trial judge, and a similar one addressed to a member of the appellate court. Indeed, I think a somewhat stricter rule should justly

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apply. The trial judge may and often does feel that his findings of fact reached with travail of conscience, may not be unassailable in the view of others equally capable; yet, having done his best, he expresses no misgivings, though they exist and strongly move him to grant the stay.

But one who did not hear the case fully tried and argued, has, I think, small right to base action on facts. Except in the extremest cases, the facts must be assumed as reported from the lower court, whether through judge or jury. Any other attitude on the part of the judge ad quem, would convert the motion into a species of irregular, and often indecent, new trial. For these reasons, it is held that for present purposes, the propriety of granting the stay asked, rests on a case whose facts are literally as found by the District Court. And by facts, I mean, not only facts physical, phenomena seen or heard, but mental conditions or intents, so far as definitely stated.

[2-4] II. This action relates only to an alleged property right; i. e., the claim of a New York corporation to have certain second-class matter forwarded to destination through the United States mail. Equity is resorted to solely to prevent irreparable pecuniary damage. Defendant justifies under an order of the Postmaster General, and the Department of Justice defends; but all this does not prevent the suit from being one between private parties, in the same sense as that phrase is true of actions against collectors of internal revenue for illegal exaction of taxes. The action is not against the sovereign, technically.

What the bill demanded, therefore, was that the mail aforesaid, viz., sundry copies of the "Masses," should be sent forward; and the District Court so ordered on July 26th. It now appears that on the day before (decision being known) plaintiff requested defendant to give back the withheld magazines, and not forward them; other arrangements for distribution having been made.

This means that plaintiff no longer desires the only avowed object of action; the business foundation of the suit has dropped out. But it remains true that the obligation to distribute this particular issue of the "Masses" has a most important bearing on any postmaster's duty to forward future or similar publications. Therefore, as long as the prayer of the bill is unfulfilled, plaintiff has a legally real subject of litigation, although it further appears that plaintiff is not now exposed to any loss not coverable by damages already liquidated or ascertainable.

Defendant's situation, however, is quite different. The order appealed from, if complied with, fulfills the whole object of suit. If reversed, no restitution or restoration of status quo is possible; and in my judgment the appeal becomes a futility, presenting to the appellate court nothing but an interesting moot point. A court may hold a case sub judice, until it becomes moot. The Supreme Court did so lately, in the well-known habeas corpus taken out by Hon. H. Snowden Marshall. 243 U. S. 521, 37 Sup. Ct. 448, 61 L. Ed. 881. But could it be pretended that the Supreme Court should or could have taken cognizance of that appeal, if brought on for argument after the expiration of the Congress which proceeded against Mr. Marshall? I

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think not, and therefore strongly incline to the view that this is the rare instance in which an appeal without a stay is not only futile, but legally impossible; yet the statute gives the absolute right of appeal.

[5-7] III. The facts found may be imperfectly, but sufficiently, summarized thus: Taking certain pictures and articles in this magazine, especially objected to by defendant, and drawing no inferences from the general tone and previous issues of the periodical, the books now lying undelivered in the post office, and the sole subject of this suit, assert that the laws of the United States passed for the creation of military forces and the prosecution of war, violate "the fundamental rights of any free people"; that conscription especially "is the destruction of youth, democracy, and labor, and the desolation of the family"; that the United States has attempted to "ensnare" Russia into "a continuance of war for purposes prejudicial to true democracy"; that persons (naming them) who have defied and resisted the laws having military success as their object, and been duly convicted or otherwise punished for such offenses, are worthy of "admiration" and "possible emulation."

It is further found that these specified writings and pictures "may interfere with the success of the military forces of the United States," because this publication and its kind "enervate public feeling at home (which is their chief purpose), and encourage the success of the enemies of the United States abroad (to which they are usually indifferent)." But all these statements of plaintiff are not "of fact"; they are "within the range of opinion and of criticism; they are all certainly believed to be true by the utterer."

Upon these findings, and the assumption that what is unlawful under the act of June 15, 1917, is unmailable, is based the conclusion of law that the act "forbids any one from willfully causing insubordination, disloyalty, mutiny, or refusal of duty in the military and naval forces of the United States" and that "to arouse discontent and disaffection among the people with the prosecution of the war, and with the draft tends to promote a mutinous and insubordinate temper among the troops." But, "if one stops short of urging upon others that it is their duty or their interest to resist the law, one should not be held to have attempted to cause its violation."

Therefore, because no writing or picture, of those specifically objected to by the defendant on the hearing (without any reference to the rest of the magazine or its history or environment), "directly advocated resistance" to (especially) the Conscription Act, the order appealed from was granted. The foregoing only follows through the findings and conclusion on one subdivision of the act, but that is enough for present purposes.

IV. The Postmaster General had found as a fact (inter alia) that the "Masses" sought to promote a mutinous, disloyal, and insubordinate spirit among troops; I think the District Court did not disagree as to that. But it was held that, because the plaintiff stopped short of urging resistance, the law was not violated. The questions presented, or some of them, are: (1) Is such view of the law correct? (2) Is it so clearly correct that the courts should interfere? For it is admitted that the Postmaster General held that such indirect incitement

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to disloyalty, etc., as the court found in the magazine, did amount to resisting and therefore violating the law.

This second query must be first answered, for courts do not interfere, except in the clearest cases, with the action of one of the great executive departments in interpreting law affecting that department. Smith v. Hitchcock, 226 U. S. 58, 33 Sup. Ct. 6, 57 L. Ed. 119. In my opinion it is very difficult to answer this question in the affirmative.

As to the first query, it is at least arguable whether there can be any more direct incitement to action than to hold up to admiration those who do act. Oratio obliqua has always been preferred by rhetoricians to oratio recta; the Beatitudes have for some centuries been considered highly hortatory, though they do not contain the injunction "Go thou and do likewise." At all events, it is a point plainly suitable for the attention of an appellate court.

Behind and beyond these questions of statutory construction, and of how far discretionary action (and all injunctions pendente lite are discretionary) by the judicial department may interfere with executive discretion, lies a fundamental inquiry as to the nature of the postal service. In respect of the mails the United States is certainly not a common carrier; it is pursuing a high governmental duty (Searight v. Stokes, 3 How. 169, 11 L. Ed. 537; cf. Re Debs, 158 U. S. 583, 15 Sup. Ct. 900, 39 L. Ed. 1092), and it is at least arguable whether any constitutional government can be judicially compelled to assist in the dissemination and distribution of something which proclaims itself "revolutionary," which exists, not to reform, but to destroy, the rule of any party, clique, or faction that could give even lip service to the Constitution of the United States.

V. (1) So far as the parties are concerned, the present and actual situation is such that any wrong suffered by plaintiff can be wholly redressed by damages, apparently (only) measured by the expense of the different transportation arrangements now confessedly perfected.

(2) So far as the public interest is concerned, enough has already been said, except to point out that the Circuit Court of Appeals for this circuit has not closed its term; it can be convened at any time on the summons of the senior judge.

The existing stay will be continued, on terms specifically set forth in the order filed herewith.

(245 Fed. 106)

GUFFEY et al. v. SMITH et al.

(Circuit Court of Appeals, Seventh Circuit. August 10, 1917.)

Nos. 2405, 2406.

1. COMPROMISE AND SETTLEMENT ⟹12—CONSTRUCTION—PRESUMPTION.

Complainants, who acquired an oil lease, did no development work thereafter. The lessor granted another lease, and appellees, the lessees, having struck oil, complainants asserted rights prior to their lease. Complainants and appellees thereafter entered into an agreement that they should share equally in the seven-twelfths interest in the lease claimed by appellees, that the money held by an oil company should be divided, but

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that appellees should not be liable for seven-twelfths of the amount theretofore paid them and others claiming interest under the second lease. It was discovered that appellees' interest previously had been larger, and they had received payments amounting to more than seven-twelfths of the total sum paid last lessees by the oil company. *Held* that, as the purpose of the agreement was to avoid a lawsuit, it must be presumed that the contract forgave appellees for all payments received; it being their contention that the amounts they had received were devoted to the development work.

2. COMPROMISE AND SETTLEMENT ⟹12—CONSTRUCTION.

In a suit involving the construction of a compromise entered into between junior and senior lessees of oil lands, *held*, in view of all of the circumstances and a subsequent agreement between the parties making the compromise, that the junior lessees were excused from liability for all payments made them prior to the agreement.

Appeal from the District Court of the United States for the Eastern District of Illinois.

Suit by Joseph F. Guffey and others against James A. Smith and others. From the decree, denying complainants relief sought, they appeal. Affirmed.

Isaac H. Mayer, of Chicago, Ill., for appellants.

Walter T. Gunn and George F. Rearick, both of Danville, Ill., for appellees.

Before BAKER, KOHLSAAT, and MACK, Circuit Judges.

BAKER, Circuit Judge. Smith, owner of lands in Illinois, made an oil lease to Guffey and associates. Thereunder no development work was done. Subsequently Smith made a similar lease to Solley and associates. After the junior lessees had struck oil, the seniors began suit for possession and accounting. At this time the junior interests were owned, by Solley and Johnson, seven-twelfths, and by Hennig and Ellis, five-twelfths. Pending a decision in the Supreme Court (237 U. S. 101, 35 Sup. Ct. 526, 59 L. Ed. 856), Guffey and associates effected a compromise with Solley and Johnson. During the subsequent accounting hearing against Hennig and Ellis in the District Court, Guffey and associates raised a contention that Solley and Johnson should be made to account for an alleged overpayment by the Ohio Oil Company, which had been purchasing the output of the junior lessees. From a denial of this claim Guffey and associates are appealing.

In the written contract of settlement it was provided:

"Appellants [the Guffeys] and appellees [Solley and Johnson] shall share equally in seven-twelfths of the properties and proceeds thereof; that is to say, appellants shall be entitled to seven twenty-fourths and appellees to seven twenty-fourths in the following moneys and properties:

"(a) The money now held by the Ohio Oil Company, amounting to $42,674.83.

"(b) The net proceeds now or hereafter in the hands of Haskell, receiver."

After paragraphs relating to reciprocal assignments of seven twenty-fourths interests in the leases, filing of stipulations, etc., the contract concluded:

"It is further agreed that the appellees shall not be held liable for seven-twelfths of the $52,330.74 heretofore paid them, Walter Hennig and M. Ellis by the Ohio Oil Company."

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Guffeys sent a copy to the attorney of the Ohio Oil Company; he replied that the books of the company showed that Solley and Johnson were entitled to $31,588.92, not $24,893.60, which would be seven-twelfths of the $42,674.83 on hand; and the Guffeys thereupon arranged for a meeting of the widely scattered parties in interest at the office of the Oil Company in Findlay, Ohio.

This controversy respecting the facts of the case is concerned principally with what occurred at Findlay; and the success of the Guffeys' appeal depends upon their ability to establish from the record that they had no knowledge, prior to or at the Findlay meeting, that the Ohio Oil Company had paid to Solley and Johnson before the Guffeys' suit was begun $39,173.85 and not merely the $30,526.23, which was seven-twelfths of the total payments of $52,330.74. From a full examination of the entire evidence, we give a brief summary of the reasons why we find that the master, who heard the witnesses orally, and the District Judge, who overruled the exceptions to the master's report, made no mistake in holding the Guffeys to their stipulation for a dismissal as to Solley and Johnson.

[1] 1. At the time of the compromise Solley and Johnson owned only seven-twelfths of the junior lease. While the record is unsatisfactory as to names, dates, and shares, it is clearly deducible from the record, particularly from exhibits of books of the Oil Company, that various assignments of interests in the junior lease had been made from time to time, and that Solley and Johnson prior to the bringing of the Guffeys' suit and for some time afterwards had owned a larger share than seven-twelfths. To end the lawsuit is the most reasonable motive to ascribe to both parties in making the compromise. As to title, Solley and Johnson then owned seven-twelfths of the junior lease. Against this the Guffeys put seven-twelfths of the senior lease. By division of the two interests the Guffeys obtained half of what Solley and Johnson owned in the junior lease. Viewing clauses (a) and (b) in the light of the above ascribed motive it seems clear to us that the Guffeys intended to take and Solley and Johnson to give one-half of whatever sums were coming from the Oil Company and receiver. It was assumed that, because Solley and Johnson then owned only seven-twelfths of the junior lease, they were entitled to only seven-twelfths of the moneys held up by the Oil Company pending the outcome of the suit. The term "seven-twelfths" was therefore intended to be descriptive of the Solley and Johnson interest in the funds on hand. As to the money that was spent and gone, Solley and Johnson could not divide; but they could go into their pockets to account for half they had received. Against the Guffeys' claim that they should do so, they insisted that nearly all that money had gone into creating the value of the oil leases which were being divided, and that they therefore should not be held to account for the past. Viewing the concluding paragraph in the light in which clauses (a) and (b) have been read, it would seem that Solley and Johnson intended to demand and Guffeys to grant forgiveness of Solley and Johnson's share in the moneys paid by the oil company before suit was instituted. Thus a settlement of the suit, so far as Solley and Johnson were concerned, would be provided for. Other-

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wise there would remain to be litigated, not merely whether Solley and Johnson had received more than they were entitled to when the payments were made, but whether they had actually received more than seven-twelfths of the total.

[2] 2. When the attorney of the Oil Company wrote the Guffeys that the books showed $6,695.32 to the credit of Solley and Johnson in excess of seven-twelfths of the total credits, they asked for a meeting at which Solley and Johnson should agree to an interpretation or a correction of the contract so that "seven-twelfths" in clauses (a) and (b) should be taken as descriptive of the actual interest of Solley and Johnson in the funds; and they stated in that letter that the understanding of all parties was that the money paid out by the Oil Company should not be taken into account and that the leases and moneys on hand were to be equally divided. One might reasonably suppose that, in a meeting where the Guffeys were demanding and getting an interpretation or a correction whereby "seven-twelfths" in clauses (a) and (b) meant actual interest, Solley and Johnson would demand and get an interpretation or a correction whereby "seven-twelfths" in the concluding paragraph would mean actual payments. And one might reasonably suppose that, when the Guffeys were acting on notice that Solley and Johnson, though now owning only seven-twelfths, were credited with an excess in the fund accumulated since the lawsuit, they would have inferred that Solley and Johnson might have drawn more than seven-twelfths of the funds distributed before the suit was started.

3. Solley, Johnson, and Hurley (attorney for the Oil Company) are very positive that at the Findlay meeting the correction of "seven-twelfths" in both places in the contract was orally agreed to by all the parties. The Guffeys claim that the correction was made only in their own interest and that the concluding paragraph was not discussed or mentioned. We regard the positive testimony as the more reasonable and more credible. Furthermore, Hurley identified as an exhibit a tabulated statement from the books of the Oil Company, which showed, not only the several credits for the retained moneys, but also the several distributions made before the suit was begun; and he testified that this statement was on the table before the parties and was examined by all. And a copy of this tabulated statement was furnished to Troup, one of the Guffeys' attorneys, more than three months before the compromise agreement was executed.

4. Against the Solley and Johnson version of the Findlay meeting the strongest item is the voucher prepared by Hurley to cover the payment of $15,794.46 then made to the Guffeys. It states that the Guffeys are receiving "the proceeds of one-half of the seven-twelfths working interest oil run from the Smith farms," and are releasing liability for "moneys heretofore paid Solley and Johnson for the seven-twelfths working interest oil run from these farms." But it also states that payment is made in pursuance of the compromise contract and a subsequent understanding thereof, "wherein all matters in difference and litigation between these parties are compromised and settled." And inasmuch as the stated sum, $15,794.46, is greater by $3,347.66 than one-half of seven-twelfths of the money in the hands of the Oil

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Company, again it is evident that the parties were using the phrase "seven-twelfths" as descriptive of Solley and Johnson's actual interest, and not as an arithmetical formula for the division of the fund.

The decree is affirmed.

In No. 2406, a companion case, the decree is affirmed.

(245 Fed. 110)

INTERNATIONAL TRUST CO. v. MYERS et al.

(Circuit Court of Appeals, First Circuit. August 25, 1917.)

No. 1289.

BANKRUPTCY ⟹467—COMPOSITION—REVIEW—FINDING.

An order of the trial court, confirming the referee's report overruling objections to composition, based on the ground that bankrupt had obtained credit by means of a materially false written statement, will not be disturbed on appeal, where the evidence did not clearly show that the trial court was wrong.

Appeal from the District Court of the United States for the District of Massachusetts; James M. Morton, Jr., Judge.

In the matter of the bankruptcy of Samuel A. Myers and others. Composition was offered, and the International Trust Company, a creditor, objected. The report of the referee, overruling the objections, was sustained by the District Court, and the International Trust Company appeals. Affirmed.

The following is the opinion of Morton, District Judge, on confirmation of composition:

The objections chiefly relied upon in argument are based upon the statement of financial condition made by the alleged bankrupts to the objecting creditor. It was given to the creditor on March 27, 1916, at the latter's request, and purported to state the financial condition of the alleged bankrupts as it appeared on their books on January 1, 1916. The referee finds that there was no borrowing on the strength of the statement until October 2, 1916, and that the statement was a correct abstract of the respondents' books; and these findings are not disputed.

The objecting creditor, in support of the contention that the statement was intentionally false, relies principally upon two matters. The first of these is the omission altogether from it of a note for $3,000, made by the alleged bankrupts and secured by a mortgage on their real estate in Stoughton. The respondents owned real estate in Stoughton and mortgaged it for $3,000 to the Stoughton Trust Company. They did not include this mortgage indebtedness in their statement. Neither did they include the value of the real estate, which appears to have been more than the amount of the mortgage. They apparently supposed that the statement covered only their commercial business, and that the Stoughton real estate was outside of it. If the real estate had been shown as an asset, and the mortgage indebtedness as a liability, the result would have been an increase in the net worth of the respondents.

The other item relied upon by the objecting creditor is the "Accounts Receivable," which are given in the statement as $58,425.06. That the respondents had on their books accounts receivable of that amount is not disputed. At the date of the statement, however, $27,000 of these accounts had been assigned to the Commercial Investment Trust, which had advanced 80 per cent.

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of the face value thereof. Further adjustments were to be made between the respondents and the Commercial Investment Trust in respect to the other 20 per cent. The respondents included as assets in their "Accounts Receivable" the $27,000 of accounts so assigned; on the other side they included in their liabilities as debts the sums received on the assigned accounts.

The objecting creditor contends that the accounts in question, having been absolutely assigned, were no longer the property of the respondents, and could not properly be included as assets; that the sums received upon said accounts were payments of the accounts pro tanto, and were not loans to the respondents; that the statement was therefore false; and that, as the respondents knew all the facts, they are fixed with knowledge of the falsity. The facts as found by the referee hardly support this view of the transactions between the respondents and the Commercial Investment Trust; but the case does not, I think, turn upon a close and exact analysis of these transactions.

A false statement of the character here in question (Bankruptcy Act, § 14b (3) [Comp. St. 1916, § 9598]), in order to be a bar to a discharge, must have been made with knowledge that it was false, and with the actual intent to obtain property or credit by means of a false statement. The learned referee has found, in substance, that the respondents did not intend the statement to be false, did not believe that it was false, and had no purpose dishonestly to obtain credit. I am asked to disregard his findings, and to hold that he was plainly wrong in his views. I am not prepared to do so. There is no persuasive evidence of dishonesty. It seems to me that the learned referee, who saw the respondents and heard them testify, and was in a much better position than I am to decide correctly whether there was a dishonest purpose or intent, was probably right in his conclusions on this point.

The objecting creditor urges that, if the assignment of almost half of the accounts receivable had been disclosed to it, credit would not have been extended; that there was a duty on the part of the respondents, when called upon for a statement of financial condition, to state the fact of the assignments; and that the statement, not disclosing such fact, was therefore knowingly and intentionally false. The short answer is that, if the objecting creditor considered that point material, it ought to have inquired about it. The statement shows on its face what it is. It ought not to be extended by implication to include recitals which it does not contain, and which were never made by the alleged bankrupts.

The other objections relied on are based upon alleged false statements made by the respondents in the schedules and on their examinations. Both in the original schedules, and on the examinations before the receivers, each respondent stated under oath that all his policies of life insurance were payable to his wife. The facts were that on the life of each respondent was a $20,000 policy payable to the firm. After the examination the schedule was amended to show these facts. Various policies of life insurance owned by the respondents had been assigned to their wives on January 2, 1917. The explanation offered by the respondents for their failure to refer to the $20,000 policies in their schedules and in their examinations was that each of the respondents supposed that his $20,000 policy had been assigned to his wife at the time when his other policies were so assigned. The learned referee accepted the explanation offered, and does not find any intentional concealment or misstatement in respect to these two policies. It cannot be said that in this conclusion he was clearly in error. The other specifications of objection based on the policies of insurance are waived by the objecting creditor.

No sufficient reason appearing for disregarding any of the learned referee's findings, his report stands confirmed.

Offer in composition approved.

John R. Lazenby and Julius Nelson, both of Boston, Mass., for appellant.

Before DODGE and BINGHAM, Circuit Judges, and HALE, District Judge.

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PER CURIAM. Objections specified by the appellant to an accepted composition were referred to the referee, who reported that he found none of them sustained; whereupon the court, after due hearing, confirmed the composition. The appellant has insisted here, not upon all the objections originally specified, but upon one ground of objection only, viz., that the bankrupts had been guilty of obtaining money on credit upon a materially false statement in writing, made by them to said appellant for the purpose of obtaining credit from it. Bankruptcy Act, §§ 12d (2), 14b (3) (Comp. St. 1916, §§ 9596, 9598).

The evidence before the referee, his report thereon, and a memorandum of the District Judge's reasons for agreeing with the referee are before us. That on March 27, 1916, the appellant received from the bankrupts a signed statement in writing purporting to be "a copy of our financial statement taken from inventory January 1, 1916," is undisputed; also that the appellant, relying thereon, thereafter loaned the bankrupts $20,000 in all, on various dates from October 2 to December 18, 1916, both inclusive.

A consideration of the evidence before the referee and the District Judge has left us unable to say that they were clearly in error in finding it insufficient to prove said statement materially false and made for the purpose of obtaining credit thereby. We accept the reasoning and conclusions of the District Judge thereon.

The order of the District Court, confirming the composition, is therefore affirmed, and the appellees recover their costs of appeal.

(245 Fed. 112)

CLARK v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. September 4, 1917.)

No. 2931.

1. WITNESSES ⟹220—PRIVILEGED COMMUNICATIONS—PRELIMINARY QUESTIONS.

Though the letter be privileged, error cannot be predicated on the overruling of objection on that ground to the preliminary question to defendant whether the signature to the letter shown him was his.

2. POST OFFICE ⟹49—USE OF MAILS—FRAUDULENT SCHEME—EVIDENCE.

The indictment for using the mails to promote a fraudulent scheme, charging it to be to solicit from physicians the collection of accounts on percentage, and then to convert all the collections, admission in evidence of defendant's advertisement to sell a half interest in a business paying more than a certain amount per month, if tending to show, as it may, that he had made representations in the advertisement which he could make good only by appropriating collections in accordance with the scheme charged, is not reversible error.

3. CRIMINAL LAW ⟹901—MOTION TO DISMISS—WAIVER.

Defendant's motion, at the conclusion of the prosecution's evidence, to dismiss, was waived by introduction of evidence on his behalf, and by his failure to move for an instructed verdict at the close of the evidence.

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4. CRIMINAL LAW ⟹1023(13)—APPEAL—REVIEW—DENIAL OF NEW TRIAL.
The Circuit Court of Appeals cannot review denial of defendant's motion for new trial.

5. CRIMINAL LAW ⟹1054(1)—APPEAL—REVIEW—EXCEPTIONS.
Rulings in admitting and refusing to strike evidence cannot be reviewed; exceptions not having been taken thereto.

In Error to the District Court of the United States for the Southern Division of the Southern District of California; Oscar A. Trippet, Judge.

Marion McMillan Clark, indicted as M. M. Clark, was convicted, and brings error. Affirmed.

Oliver J. Marston and Walter A. Ham, both of Los Angeles, Cal., for plaintiff in error.

Albert Schoonover, U. S. Atty., and Gordon Lawson, Asst. U. S. Atty., both of Los Angeles, Cal.

Before GILBERT and HUNT, Circuit Judges, and DIETRICH, District Judge.

GILBERT, Circuit Judge. The plaintiff in error was convicted upon an indictment which charged him, under section 215 of the federal Penal Code (Comp. St. 1916, § 10385), with the offense of using the United States mails to promote a scheme to defraud. He, together with two others, had entered into a copartnership known as the Physicians' Protective Association, for the purpose of soliciting from and collecting for physicians, surgeons, and dentists outstanding accounts on a percentage basis, and the indictment charged that the scheme was fraudulent in that, disregarding such agreement with the physicians, surgeons, and dentists to collect upon commission, the purpose and intention of the defendants was to appropriate and convert to their own use all or any part of such collections as they desired.

[1] The plaintiff in error assigns as error that the court below overruled his objection to the question which was asked him:

"I hand you here a letter, and ask you to look at the signature of that letter and say whether or not it is your signature."

The objection was that the letter was a privileged communication between attorney and client. If the assignment were directed to the admission of a letter which was a privileged communication between attorney and client, a question would be presented for our determination. But, as it is, nothing is brought before us except the bare fact that the plaintiff in error was asked whether he had signed a cerain letter. That question was but preliminary, and no error can be predicated upon the ruling of the court in permitting it to be answered.

[2] It is assigned that the court erred in overruling the objection of the plaintiff in error to the admission in evidence of a certain exhibit, to which objection was made that it was irrelevant, incompetent, and immaterial. That exhibit was an advertisement published by the plain-

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tiff in error on August 27, 1914, while he was carrying on the business of the Physicians' Protective Association. So far as it is material to the case, it contained the following:

"For Sale.—One-half interest in an exclusive business now paying more than $250 per month. Will pay buyer $75 per month, and divide profits above that amount."

It is contended that the advertisement tended to show that the plaintiff in error had committed an offense other than that with which he was charged in the indictment. There is nothing in the terms of the advertisement itself to show the commission of an offense. It may have tended to show, and probably it was introduced for that purpose, that the plaintiff in error had made representations in his advertisement which he could make good only by appropriating collections, in accordance with the scheme charged in the indictment. If so, its admission was not reversible error.

[3] Error is assigned to the denial of the motion of plaintiff in error to dismiss at the conclusion of the plaintiff's testimony. To this it is sufficient to say that the motion was waived by the introduction of evidence on behalf of the plaintiff in error, and his failure to move for an instructed verdict at the close of the evidence.

[4] The assignment that the court erred in overruling the motion of plaintiff in error for a new trial presents no question that this court can review. That proposition is so well settled as to make the citation of authorities unnecessary.

[5] In the brief of the plaintiff in error, other alleged errors in the admission of evidence, and the refusal of the court to strike evidence from the record, are discussed; but no exceptions were taken to the rulings of the court below, and we cannot consider them.

The judgment is affirmed.

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(245 Fed. 115)

PLAZUELA SUGAR CO. v. PASTORIZA et al. (two cases).

(Circuit Court of Appeals, First Circuit. August 25, 1917.)

Nos. 1262, 1263.

1. COURTS ⟹405(1)—CIRCUIT COURT OF APPEALS—DECISIONS APPEALABLE—SCOPE OF REMEDY.
Where plaintiffs' complaint, seeking a judgment enjoining the operation of a railroad constructed upon their lands by defendant and an order directing removal, was dismissed in the district court, but the Supreme Court of Porto Rico, on appeal, reversed the district court's judgment, and entered judgment in accordance with the prayers of the complaint, an appeal to the Circuit Court of Appeals for the First Circuit is an appropriate procedure to review the judgment of the Supreme Court of Porto Rico, and a writ of error to the judgment must be dismissed.

2. RAILROADS ⟹65—RIGHT OF WAY—RIGHT TO.
Where defendant entered on plaintiffs' land and constructed a railroad, without obtaining any grant of a right of way or paying any consideration, and in reliance solely on plaintiffs' alleged oral permission and their acquiescence, defendant did not establish any right to continue the operation, but at most should be treated as a licensee under a license revocable at pleasure, and on plaintiffs' revocation of the license the railroad may be directed removed.

3. COURTS ⟹406(1)—SUPREME COURT OF TERRITORY—REVIEW—DETERMINATION OF LOWER COURT.
In reviewing a judgment of the Supreme Court of Porto Rico, in an action where the local law governs, the Circuit Court of Appeals must uphold the decision of the lower court, unless convinced that clear error was committed.

4. ESTOPPEL ⟹93(4)—EQUITABLE ESTOPPEL—HOW RAISED.
Though plaintiffs gave defendant an oral license to construct a railroad on their lands, and allowed the construction without objection, making no objection to the operation of such road until after it had been continued for over five years, plaintiffs' acquiescence did not, the railroad not being used as a common carrier, but solely for defendant's benefit, ripen into an equitable estoppel, precluding plaintiffs from thereafter requiring the removal of the road.

Appeal from and in Error to the Supreme Court of Porto Rico.

Action by José Maria Torres Pastoriza and others against the Plazuela Sugar Company, begun in the district court for Porto Rico, where the complaint was dismissed. On appeal to the Supreme Court for Porto Rico, there was a judgment for plaintiffs, and defendant appeals and brings error. Judgment appealed from affirmed, and writ of error dismissed.

Joseph B. Jacobs, of Boston, Mass. (Cay. Coll Cuchi, of San Juan, Porto Rico, and Jacobs & Jacobs, of Boston, Mass., on the brief), for appellant and plaintiff in error.

Otto Schoenrich, of New York City (Curtis, Mallet-Prevost & Colt, of New York City, on the brief), for appellees and defendants in error.

Before DODGE and BINGHAM, Circuit Judges, and BROWN, District Judge.

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DODGE, Circuit Judge. Both these proceedings seek the reversal of a judgment rendered by the Porto Rican Supreme Court July 28, 1916. The judgment was rendered in a case originally brought by the appellees and defendants in error here, hereinafter called plaintiffs, in the district court of Arecibo, against the appellant and plaintiff in error, hereinafter called defendant.

There is no dispute that the defendant, a corporation operating a sugar mill in Arecibo, had in 1907 or 1908 built a private railroad, which crossed lands owned by the plaintiffs, and had since operated said railroad by running trains over it, which carried sugar cane to said factory across the plaintiffs' lands. Alleging that they had never "executed any deed of servitude on behalf of the defendant corporation," and had repeatedly requested the defendant to discontinue running said trains and remove said tracks from their lands, the plaintiffs' complaint asked the court of first instance to declare that "no servitude existed on behalf of any estates of the defendant," to enjoin further operation of the railroad upon their lands and to order removal of the tracks therefrom.

[1] From the dismissal of their complaint by said district court, the plaintiffs appealed to the Supreme Court, which reversed the judgment below and entered judgment in accordance with the prayers of the complaint, which is the judgment now before us for review. We see no reason to doubt that it is properly here under the appeal. The assignments of error relied on are the same in both proceedings.

[2, 3] The defendant showed no written grant from the plaintiffs of any right whatever to use their land, nor anything in writing evidencing their consent, either to the original building of the railroad within their premises or to its subsequent maintenance there. The defendant relied solely on alleged oral consent by the plaintiffs to the building of the railroad and their subsequent acquiescence without objection in its operation. It did not appear that the plaintiffs ever requested the building of said railroad or were in any way benefited thereby. The oral consent relied on was given upon a request by the defendant for permission to lay its rails over the premises. No payment or other recompense, either for permission to lay the rails or to maintain them, was ever offered to or received by the plaintiffs, so far as shown. The Supreme Court held that there had been no consideration sufficient to give the defendant the rights which it asserted.

Upon the evidence, we find no reason for differing from the conclusions adopted by the Supreme Court. The plaintiffs, in our opinion, sufficiently established their right to the relief sought. It could not justly be said that the defendant had ever acquired rights against the plaintiffs beyond those of a licensee under a license revokable at their pleasure. The question was, of course, to be determined according to the law of Porto Rico; and, so far as that law is involved, we must uphold the decision of the court below, unless convinced that clear error was committed by it. Cardona v. Quinones, 240 U. S. 83, 88, 36 Sup. Ct. 346, 60 L. Ed. 538. Such conviction is wholly wanting in the present case.

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[4] That the plaintiffs became equitably estopped to revoke the license given when the railroad was built by their acquiescence in the defendant's subsequent use of their land, under the circumstances shown, we are entirely unable to believe. No public right or convenience is involved. We cannot hold that the plaintiffs have forfeited any rights belonging to them as owners of their land, merely because they have been accommodating enough to let the defendant use it as above, without pay, for its own benefit, during the six or seven years preceding their institution of this suit.

In No. 1262, the judgment appealed from is affirmed, and the appellees recover their costs of appeal.

In No. 1263, the writ of error is dismissed. without costs.

(245 Fed. 117)

KANSAS CITY, C. & S. RY. CO. v. SHOEMAKER.*

(Circuit Court of Appeals, Eighth Circuit. September 3, 1917.)

No. 4922.

1. TRIAL ⟹260(8)—INSTRUCTIONS—REQUESTS COVERED BY INSTRUCTIONS GIVEN.

In a railway employé's action for injuries sustained in a collision at a highway crossing between a railway motorcar and an automobile, the court charged that if the operator of the motorcar saw or by the exercise of ordinary care and prudence might have seen and anticipated the approach of the motorcar, and avoided the collision, he was negligent, that the jury must judge whether he saw or might have seen the automobile in time to stop and avoid the accident, and that it was incumbent on him merely to take such observation as would apprise him of the situation that there was or was likely to be impending danger, to such an extent that it would become his duty to exercise ordinary care to avoid it, and that, if he did not exercise such care, he was negligent. *Held*, that this did not cover defendant's requested instruction that the operator was under no obligation to stop because he saw or might have seen the automobile approaching, and that he had a right to assume that the automobile driver would stop, and not attempt to cross the track.

2. MASTER AND SERVANT ⟹137(3), 293(19)—INJURIES TO EMPLOYÉ—OPERATION OF RAILROADS—INSTRUCTION.

The requested charge stated a correct rule of law and should have been given.

In Error to the District Court of the United States for the Western District of Missouri; Arba S. Van Valkenburgh, Judge.

Action by Harvey H. Shoemaker against the Kansas City, Clinton & Springfield Railway Company. Judgment for plaintiff, and defendant brings error. Reversed, and new trial ordered.

John H. Lucas, of Kansas City, Mo. (William C. Lucas, of Kansas City, Mo., on the brief), for plaintiff in error.

H. M. Langworthy, of Kansas City, Mo. (J. C. Hargus, O. H. Dean, and W. D. McLeod, all of Kansas City, Mo., on the brief), for defendant in error.

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*Rehearing denied December 19, 1917.

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Before SANBORN and CARLAND, Circuit Judges, and BOOTH, District Judge.

CARLAND, Circuit Judge. This is an action by Shoemaker against the railway company to recover damages for a personal injury received by him while riding upon a motorcar of the company, which was being driven by another employé of the company by the name of Green. It is conceded that the action arises under the act of Congress relating to the liability of common carriers by railroads to their employés in certain cases (35 Stat. 65) and the amendments thereto (36 Stat. 291). Comp. St. 1916, §§ 8657–8665.

The injury to Shoemaker was caused by a collision between the motorcar, as it is called in the evidence, with an automobile at a public highway crossing. The negligence alleged in the petition is that of Green, the employé of the railway company in charge of the motorcar, saw or by the exercise of ordinary care could have seen that the automobile was approaching the crossing, and that said motorcar was liable to strike said automobile; that notwithstanding this fact Green continued to operate the motorcar at a high, dangerous, and reckless rate of speed, and failed to exercise ordinary care to reduce the speed of said motorcar, or stop the same, so as to prevent striking said automobile. There was a verdict against the railway company, and it has brought the case here assigning error.

[1] At the close of the evidence counsel for the railway company requested the court to charge the jury as follows:

"The operator of the handcar was under no obligations to stop his car because he saw, or might have seen, the automobile approaching the crossing. He had a right to presume that the driver of the automobile would stop, and not attempt to cross the railroad track; and the mere fact, if it be a fact, that the operator of the car saw the automobile approaching the track is not sufficient to warrant a recovery in this case."

The court refused to give this instruction, for the reason that it was covered by the general charge, to which ruling counsel for the railway company excepted. After the court had charged the jury, the following remarks passed between court and counsel in the presence of the jury:

"The defendant further excepts to the failure of the court to charge the jury that no duty devolved upon the defendant, or its employés, to stop, or attempt to stop, the car until such time as there was peril, and that, under the evidence, there was no peril in the case until the witness Reeding, with his automobile, attempted to cross the tracks.

"The Court: The court thought it had made that clear, but will state that, in going along there, you must judge whether the employé, Green, at the time saw, or by the exercise of ordinary diligence might have seen, the approaching automobile, in such time as, with the instrumentalities at his hand, to have stopped and avoided the accident.

"Mr. Lucas: I think your honor did not get the point. The point of the objection is that the charge is misleading, in that the jury may assume, from the charge, that Green, the witness, was required to take observation of the fact that the automobile was approaching the track. He was under no duty to stop his car, or attempt to stop his car, until such time as the automobile was in such close proximity to the track that he saw, or could have seen, that, if he didn't stop it, there would be a collision.

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"The Court: The court intended the jury to understand that it was incumbent upon the defendant merely to take such observation as would apprise him of the situation, that there was, or was likely to be, impending danger there, to such an extent that it would become his duty to exercise ordinary care and caution to avoid it, and that, if you find that, at any point, that was true, and that the defendant, through its employé, with the means at hand, did not exercise all that care and caution that an ordinarily careful and prudent man would to avoid the accident, then, of course, that would be negligence on his part; otherwise, if he did do all he could do under the circumstances."

The language used by the court was in line with the general instruction previously given by the court, which was to the effect that if Green saw or by the exercise of ordinary care and prudence might have seen and anticipated the approach of the motorcar, and with the means and instrumentalities at his command, might have avoided the collision, then he was guilty of negligence. In other words, whether Green was negligent or not was made to depend upon whether he by the exercise of ordinary care might have seen and anticipated the approach of the car. The element that Green had a right to presume that the driver of the automobile would stop, and not attempt to cross the railroad track, which is contained in the requested instruction, was entirely omitted from the general charge.

[2] The charge requested stated a correct rule of law applicable to the evidence, and should have been given. A majority of the court are also of the opinion that the motion for a directed verdict in favor of the railway company should have been given, but all are agreed that, if the case was one for the jury, then the refusal to charge as above requested, was error.

Judgment reversed, and a new trial ordered.

(245 Fed. 119)

PFEIL v. JAMISON.

(Circuit Court of Appeals, Third Circuit. October 11, 1917.)

No. 2238.

APPEAL AND ERROR ⟹1106(4)—DETERMINATION—REVERSAL.

Where an action for damages for false imprisonment was heard on the pleadings, and the questions involving police powers of a large municipality in times of widespread disorder could be far more intelligently disposed of when the evidence had been heard and was before the appellate court, the judgment will be reversed, and the case remanded for disposition on the evidence.

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

Action by Melvin Pfeil, a citizen and resident of the state of Ohio, against Samuel C. Jamison, a citizen and resident of the state of Pennsylvania. There was a judgment for defendant, and plaintiff brings error. Reversed and remanded, with directions.

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George J. Shaffer, of Pittsburgh, Pa., for plaintiff in error.

Charles H. Kline and C. A. Waldschmidt, both of Pittsburgh, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

PER CURIAM. This was an action for damages for false imprisonment. The case was heard in the court below on the pleadings alone, and a judgment was entered thereon in favor of the defendant. The questions involved concern the police powers of a large municipality in times of widespread disorder. Without, at present, expressing any opinion whatever on the important and far-reaching questions discussed by counsel, we are of opinion the case could be far more intelligently and wisely disposed of by this court when the evidence has been heard and is before us.

Without, therefore, indicating any view upon the subject, and solely with a view of having the light of the proofs to hereafter aid us, we reverse this judgment, and remand the cause to the court below for the further procedure indicated; the costs in this court to await the further order of this court on the final disposition of the cause.

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(245 Fed. 225)

GEDDES et al. v. ANACONDA COPPER MINING CO. et al.

(Circuit Court of Appeals, Ninth Circuit. October 1, 1917.)

No. 2831.

1. MONOPOLIES ⟹23—COMBINATIONS IN RESTRAINT OF TRADE—PERSONS ENTITLED TO QUESTION—MINORITY STOCKHOLDERS.

Minority shareholders of a corporation, which owned property valuable for copper mining, cannot, the property having been sold to defendant, attack the sale on the ground that defendant company was acquiring mines with the intention of securing a monopoly of the copper industry, in violation of Sherman Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209, for the act created a new offense, and cast upon designated officers the duty of enforcing its provisions.

2. CORPORATIONS ⟹519(3)—TRANSFER OF PROPERTY—INADEQUACY OF CONSIDERATION.

In a suit by minority shareholders to set aside a conveyance of the entire corporate property, evidence *held* to sustain a finding that the consideration was inadequate.

3. CORPORATIONS ⟹404(1)—POWERS OF DIRECTORS—STOCKHOLDERS.

That stockholders, whose stock was nonassessable, were of ample means to pay assessments, does not deprive the directors of power to dispose of corporate property, on the theory that assessments necessary to carry on the business could not be levied.

4. CORPORATIONS ⟹404(1)—DIRECTORS—POWERS OF.

At common law the board of directors of a private corporation could sell or otherwise dispose of the corporate property, subject to the limitation that it could not sell or dispose of the entire property.

5. CORPORATIONS ⟹404(1)—DIRECTORS—POWERS.

A Utah mining company, whose charter authorized it to buy, sell, lease, hold, and operate mining claims, and to buy, lease, and exchange ores, etc., and do all kinds of business incident to the management of a general mining business exhausted the profitable silver ore in its mine. The treasury was depleted, the corporation was indebted, and the stock was nonassessable. A Utah act of 1905 (Comp. Laws 1907, § 322), declares that any corporation now existing or hereafter organized for the purpose of mining may purchase, lease, or otherwise acquire mining property, and, in case the articles of incorporation do not provide for the sale or other disposition of the property of the corporation, their disposition by the board of directors shall not be valid or binding upon the corporation until confirmed by the majority in amount of the stock outstanding, at a meeting of the stockholders called to consider the action of the board, but that, when the articles of incorporation authorize the sale of corporate property by the directors or stockholders, sales made in accordance therewith shall be binding upon the corporation. *Held* that, though all of the property of a private corporation cannot be disposed of, unless authorized by statute or charter, or unless the stockholders unanimously consent, or unless disposition by the directors is necessary because the corporation is in failing circumstances or insolvent, etc., the directors of the Utah mining company were authorized to dispose of its entire property with consent of a majority of the stockholders, though the corporation's property was worth far more than its debts.

6. CORPORATIONS ⟹603—SALES—EFFECT.

A sale of all of the property of a corporation does not necessarily terminate its corporate existence, for corporations may exist without property.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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7. MINES AND MINERALS ⟹105(2)—SALE OF CORPORATE PROPERTY—POWERS OF DIRECTORS.

Under Comp. Laws Utah 1876, p. 232, subsequently made Const. Utah, art. 12, § 1, which authorized the amendment, alteration, or repeal of the statute under which a mining company was incorporated, the directors of a mining company are, under the act of 1905 (Comp. Laws 1907, § 322), enacted after incorporation, entitled to dispose of the entire corporate property with the consent of a majority of the shareholders; the by-laws of the company as originally organized providing for the acquisition and disposition of mining property.

8. CORPORATIONS ⟹318—SALE OF CORPORATE PROPERTY—CONTRACTS.

Contracts between corporations having common directors, while not prohibited, are voidable; and the burden rests on those seeking to sustain them to show clearly that they were entirely fair and free from wrong.

9. CORPORATIONS ⟹519(3)—CONTRACTS—EVIDENCE—ACTIONS.

In a suit by minority stockholders to set aside a contract whereby the entire property of a mining company was sold to defendant, where the president of the mining company was a director of defendant, evidence *held* insufficient to clearly show that the contract was entirely fair and free from wrong.

10. CORPORATIONS ⟹610(2)—DISSOLUTION—RIGHTS OF MINORITY SHAREHOLDERS.

Where authorized by statute, a minority of the shareholders cannot prevent dissolution in accord with the will of the majority.

11. CORPORATIONS ⟹318—SALE OF CORPORATE PROPERTY—EFFECT OF SALE.

Minority shareholders cannot complain of the sale of corporate property to defendant corporation, in which the majority shareholders were interested, where defendant offered the highest bid; the minority shareholders being only entitled to have the property sold free from any unfair combination on the part of the majority stockholders and defendant.

12. CORPORATIONS ⟹318—SALES—VACATION.

Where a sale of all the property of the corporation, which could sell without unanimous consent of its stockholders, to another corporation, which had common directors, was for an inadequate price, the sale will not be unconditionally set aside; but a public resale will be ordered, the property to be struck off to the highest bidder if thereby a greater amount should be realized, but otherwise the sale to remain undisturbed, for a majority of the shareholders, who consented to the sale, are in that event entitled to be protected.

Ross, Circuit Judge, dissenting in part.

Appeal from the District Court of the United States for the District of Montana; Geo. M. Bourquin, Judge.

Suit by Peter Geddes and others against the Anaconda Copper Mining Company and others. From the decree denying part of the relief sought (222 Fed. 129), complainants appeal. Affirmed.

Walsh & Nolan and T. J. Walsh, all of Helena, Mont., for appellants.

L. O. Evans, of Butte, Mont., W. B. Rodgers, of Anaconda, Mont., and D. Gay Stivers, of Butte, Mont., for appellees.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

ROSS, Circuit Judge. This suit was brought by certain minority stockholders of the appellee Alice Gold & Silver Mining Company,

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a corporation organized in 1881 under the laws of the then territory of Utah, to procure a decree annulling a deed of all of its property to the appellee Anaconda Copper Mining Company, a corporation, made in consideration of a transfer of 30,000 shares of the capital stock of the latter company to the Alice Company—the grounds upon which the relief is sought being, first, that neither the board of directors nor a majority of the stockholders of the Alice Company was authorized to sell or dispose of all of its property against the protest of any of its stockholders; second, that the Alice Company had no authority to acquire the stock of the Anaconda Copper Mining Company; third, that the parties who negotiated and carried out the sale and the parties who negotiated and carried out the purchase were substantially the same, all being controlled by John D. Ryan, who was at the time a director of both companies and the president of the Alice Company, and that the consideration upon which the transaction was based was inadequate; fourth, that the purpose with which the purchase was made was to monopolize the production of copper in the Butte district of Montana, where the property is situate, and the sale of the same in the markets of the world, in violation of the federal Anti-Trust Act known as the Sherman Act.

[1] While the last point mentioned has been very ably and elaborately argued by counsel on both sides, we find it unnecessary to consider it, for the reason that, as we understand the recent decision of the Supreme Court in the case of Wilder Manufacturing Co. v. Corn Products Refining Co., 236 U. S. 165, 35 Sup. Ct. 398, 59 L. Ed. 520, Ann. Cas. 1916A, 118, it is not available to the appellants. That case involved the construction of the Anti-Trust Act and the effect of a profit-sharing contract of the Refining Company and those dealing with it exclusively, and the right of that corporation to recover for goods sold by it to the Manufacturing Company. The court, in denying the defense interposed by the purchaser, based upon the claim that the Refining Company had no legal existence, as it was a combination composed of all the manufacturers of glucose or corn syrup in the United States, illegally organized with the object of monopolizing all dealings in such products, in violation of the Anti-Trust Act of Congress, and had further sought to perpetuate its monopoly by devising a certain profit-sharing scheme, based its ruling upon two grounds, the second of which is as follows:

"In the second place, the proposition is repugnant to the Anti-Trust Act. Beyond question re-expressing what was ancient or existing, and embodying that which it was deemed wise to newly enact, the Anti-Trust Act was intended in the most comprehensive way to provide against combinations or conspiracies in restraint of trade or commerce, the monopolization of trade or commerce, or attempts to monopolize the same. Standard Oil Co. v. United States, 221 U. S. 1 [31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734]; United States v. American Tobacco Co., 221 U. S. 106 [31 Sup. Ct. 632, 55 L. Ed. 663]. In other words, founded upon broad conceptions of public policy, the prohibitions of the statute were enacted to prevent, not the mere injury to an individual which would arise from the doing of the prohibited acts, but the harm to the general public which would be occasioned by the evils which it was contemplated would be prevented; and hence not only the prohibitions of the statute, but the remedies which it provided, were coextensive with such conceptions. Thus the statute expressly cast upon the Attorney

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General of the United States the responsibility of enforcing its provisions, making it the duty of the district attorneys of the United States in their respective districts, under his authority and direction, to act concerning any violations of the law. And in addition, evidently contemplating that the official unity of initiative which was thus created to give effect to the statute required a like unity of judicial authority, the statute in express terms vested the Circuit Court of the United States with 'jurisdiction to prevent and restrain violations of this act,' and besides expressly conferred the amplest discretion in such courts to join such parties as might be deemed necessary and to exert such remedies as would fully accomplish the purposes intended. Act July 2, 1890, c. 647, 26 Stat. 209. It is true that there are no words of express exclusion of the right of individuals to act in the enforcement of the statute, or of courts generally to entertain complaints on that subject. But it is evident that such exclusion must be implied for a twofold reason: First, because of the familiar doctrine that 'where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes.' Farmers' & Mechanics' National Bank v. Dearing, 91 U. S. 29, 35 [23 L. Ed. 196]; Barnet v. National Bank, 98 U. S. 555 [25 L. Ed. 212]; Oates v. National Bank, 100 U. S. 239; Stephens v. Monongahela Bank, 111 U. S. 197 [4 Sup. Ct. 336, 28 L. Ed. 399]; Tenn. Coal Co. v. George, 233 U. S. 354, 359 [34 Sup. Ct. 587, 58 L. Ed. 997, L. R. A. 1916D, 685]. Second, because of the destruction of the powers conferred by the statute and the frustration of the remedies which it creates, which would obviously result from admitting the right of an individual as a means of defense to a suit brought against him on his individual and otherwise inherently legal contract to assert that the corporation or combination suing had no legal existence, in contemplation of the Anti-Trust Act. This is apparent, since the power given by the statute to the Attorney General is inconsistent with the existence of the right of an individual to independently act, since the purpose of the statute was, where a combination or organization was found to be illegally existing, to put an end to such illegal existence for all purposes and thus protect the whole public—an object incompatible with the thought that such a corporation should be treated as legally existing for the purpose of parting with its property by means of a contract of sale, and yet be held to be civilly dead for the purpose of recovering the price of such sale, and then, by a failure to provide against its future exertion of power, be recognized as virtually resurrected and in possession of authority to violate the law. And in a twofold sense these considerations so clearly demonstrate the conflict between the statute and the right now asserted under it as to render it unnecessary to pursue that subject further. In the first place, because they show in addition how completely the right claimed would defeat the jurisdiction conferred by the statute on the courts of the United States—a jurisdiction evidently given, as we have seen, for the purpose of making the relief to be afforded by a finding of illegal existence as broad as would be the necessities resulting from such finding. In the second place, because the possibility of the wrong to be brought about by allowing the property to be obtained under a contract of sale without enforcing the duty to pay for it, not upon the ground of the illegality of the contract of sale but of the illegal organization of the seller, additionally points to the causes which may have operated to confine the right to question the legal existence of a corporation or combination to public authority sanctioned by the sense of public responsibility, and not to leave it to individual action prompted it may be by purely selfish motives. As from these considerations it results, not only that there is no support afforded to the proposition that the Anti-Trust Act authorizes the direct or indirect suggestion of the illegal existence of a corporation as a means of defense to a suit brought by such corporation on an otherwise inherently legal and enforceable contract, but, on the contrary, that the provisions of the act add cogency to the principles of general law on the subject, and therefore make more imperative the duty, not directly or indirectly to permit such a defense to a suit to enforce such a contract, we put that subject out of view and come to the only remaining inquiry, the alleged effect of the previous ruling in the Continental Wall Paper Case [212 U. S. 227, 29 Sup. Ct. 280, 53 L. Ed. 486], supra."

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So far as the point above alluded to is concerned, the only difference between the case cited and this is that in that case a private corporation undertook to avoid the payment of money due from it under a contract with another private corporation on the ground that the latter was an illegal monopoly, and therefore had not the power to make the contract because of the Anti-Trust Act, while here the contention is that the Copper Company was without power to make a certain purchase from another private corporation because of the same act—which is, in principle, as we conceive, no difference at all.

The articles of incorporation of the Alice Company define its powers as follows:

"The business and pursuit of the corporation shall be to buy, sell, lease, hold, own, and operate mines, mining claims, mills, mill sites, furnaces and reduction and refining works, to buy, sell, and exchange mineral ores and bullion; to buy, lease, construct, and operate roads, tramways, and freight and transportation routes; to facilitate the business of the company; to appropriate, buy, and sell water, water rights, and ways for conducting the same; and generally to do all kinds of business incident to, connected with, or convenient for the management of a general mining business, in the territories of Utah, Montana, Idaho, and in any state or territory of the United States."

The record shows that the property consisted of about 140 acres of mining ground on the hill north of the city of Butte, and is contiguous to some of the properties of the Anaconda Company; that through it runs for more than three-quarters of a mile a great silver-bearing lode called the Rainbow lode, carrying some gold, upon which lode the company commenced work about 1881, sinking a shaft 1,500 feet, and running drifts of the aggregate length of about 10 miles, and from which lode it extracted a large amount of ore, out of which it paid its stockholders, commencing March 15, 1881, and ending April 27, 1898, $1,075,000—there having, however, been no dividends paid between November 23, 1891, and December 31, 1896. While that work, according to the evidence, disclosed very large bodies of zinc-lead ore, it left available no more silver ore. The zinc-lead ore being peculiarly refractory, and there not being then, nor yet, according to the evidence, any known process by which it could be worked at a profit, and the silver ore being the only kind in the mine then, or yet, according to the evidence, known that could or can be worked at a profit, work upon the mine by the company was suspended prior to 1894. From time to time thereafter it was worked in a small way under leases—the company receiving a royalty on such ore as the lessees were able to work. Water was allowed to rise in the mine, first to the 100, and afterwards to the 700, foot level, when, about 1899, the mill, which was upon one of the claims, was closed, and the company ceased operations. In 1902 the shaft house burned, but the company erected a new hoist, by which the lessees, also called in the record "tributors," could hoist the ore they desired to take out. While the leases were in operation, the royalties received by the company were insufficient to meet its necessary expenditures for insurance, taxes, and watching the property, and also proving unprofitable to the lessees, the leases were abandoned, and all work ceased. The indebtedness of the company, of course, gradually increased, and at the time of the sale in question amounted

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to $34,101.56, of which $19,575.23 was incurred in the construction of the new hoist to take the place of the one destroyed by fire. At one time during the period that the property was dormant the stock of the Alice Company—incorporated with 400,000 shares, of the par value of $25 each—sold as low as 12 cents a share, and for years was depressed to a very low point. But in 1905 John D. Ryan secured from the holders thereof an option on a majority of the stock at $1.50 a share, being on the basis of $600,000 for the whole property, and in February of the same year made the purchase pursuant to the option.

These further facts, appearing in the record and succinctly stated by counsel, should be mentioned: Prior to the year 1899 a number of independent companies were engaged in mining and smelting copper ore in and near Butte, among them the appellee Anaconda Copper Mining Company, the Washoe Copper Company, the Parrot Silver & Copper Mining Company, the Colorado Mining & Smelting Company, the Boston & Montana Consolidated Copper & Silver Mining Company, and the Butte & Boston Consolidated Mining Company, all of which were large producers of that metal. In the year mentioned the Amalgamated Copper Company was organized as a holding company, with a capital stock of $75,000,000, and it acquired a majority of the stock of the Anaconda and Parrot Companies, and all of the stock of the Washoe and the Colorado Companies, and by 1901 it had acquired a majority of the stock of the Boston & Montana and of the Butte & Boston Companies, increasing its capital stock to make these latter purchases from $75,000,000 to $155,000,000—leaving of the then large copper producing companies in the Butte field only those controlled by F. Augustus Heinze and those owned by W. A. Clark.

At the time of the formation of the Amalgamated Company there was in progress between Heinze and his companies on the one side, and the Boston & Montana and the Butte & Boston on the other, much bitter and costly litigation, which, as soon as the last-named companies became allied with the Amalgamated, involved the latter and all of its constituent companies. In 1905 and 1906 negotiations were entered into between Ryan, the president of the Anaconda and a director of the Amalgamated Company, and Thomas F. Cole, on the one side, and Heinze, on the other, for the settlement of all of the litigation and adverse claims referred to, which negotiations resulted in a final settlement by which Heinze was paid $10,500,000 in cash, in consideration of which all of the properties with which he was associated at Butte were transferred to a corporation organized by Ryan and his associates to take them over, known as the Red Metal Mining Company, all of the stock of which (having a par value of $11,000,000) was immediately acquired by another corporation organized by the same interests to hold it, with a capital stock of $15,000,000, called the Butte Coalition Company, consisting of 1,000,000 shares.

It was while these negotiations were going on that Ryan acquired, under the option that has been mentioned, a majority of the stock of the Alice Gold & Silver Mining Company, which he subsequently turned over to the Butte Coalition Company. Of the Red Metal Company, Thomas F. Cole was president, W. O. Thornton was vice-president, and J. C. Lalor, C. D. Fraser, and James O'Grady were also directors.

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Of the Butte Coalition Company, Cole was president, Ryan vice-president, and Urban H. Broughton, James Hoatson, Chester Congdon, B. B. Thayer, F. L. Ames, William B. Dickson, and A. C. Carson also directors; Thayer also being then president of the Amalgamated Company.

About the same time Ryan and his associates also acquired for the same interests all of the properties of Clark, except his Poser and Elm Orlu claims, which latter two claims were located on the Rainbow lode, and not far from the properties of the Alice Company, from both of which claims more or less copper ore has been shipped. The record also shows that a considerable quantity of copper ore has been found in a property at the easterly end of the Rainbow lode, owned by the Butte-Superior Company, which lode had, until these and perhaps other recent discoveries, always been regarded in the Butte district as a silver-bearing lode only.

Very naturally, the discovery of copper ore in commercial quantities in portions of the Rainbow lode is a reasonable basis for at least hope, and, possibly, of just expectations, that like ore may be found upon further exploration in the extensive properties on the same lode of the Alice Company—especially when the various other veins that the evidence shows exist on those properties and cross its portions of the Rainbow lode are considered, together with the known extent and huge production of copper ore in the district. At all events, that prospect, as shown by the record, entered into the estimates of the value of the Alice properties made by the experts on behalf of the appellants; they testifying that the finding of copper ore therein is a geological probability, which probability, as well as their estimates as to values, however, differed very widely from those fixed by similar witnesses of the appellees, who characterized the chance of finding copper ore in the properties of the Alice Company as a geological possibility—the value of the properties, according to the estimates of the former, being from $3,000,000 to $5,000,000; whereas, according to the opinions of the witnesses on behalf of the appellees, they brought by the sale all that they were at the time worth.

[2] The 30,000 shares of the stock of the Anaconda Copper Mining Company, for which the properties of the Alice Company were sold by its board of directors, are claimed by the appellees to have been worth at the time $1,500,000, and are conceded by the appellants to have been then worth $1,250,000, while their then value was found by the court below to have been $1,500,000 plus the amount of the indebtedness of the Alice Company, the aggregate amount of which consideration the court further found was inadequate. With that finding we are of the opinion that, upon the record, we would not be justified in interfering. Taking such to be the fact, we are therefore to consider and determine whether the judgment appealed from can be sustained—which judgment adjudged and decreed the sale in question in all respects valid and binding, and the title to all of the properties of the Alice Company to have passed thereby to the Anaconda Copper Mining Company; there having been shown to the court to have been no bidder at the offer of all of the said properties at a public sale upon

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notice published in accordance with a preceding interlocutory decree of the court.

[3-5] We are unable to agree to the contention on the part of the appellants that the properties of the Alice Company, in the condition they were at the time of the sale, and for years theretofore had been, could not be legally sold and conveyed by the directors of the company without the consent of all of its stockholders. We quite agree that the company cannot be regarded as then insolvent, for it owed but $34,101.56, payment of which, so far as appears, was not even being asked, much less urged (by the Butte Coalition Company, which it appears was the creditor), and owned properties for which the Anaconda Copper Mining Company was willing to pay the equivalent of over $1,500,000. At the same time, all of the ores the properties were known to contain that could be worked at a profit had been extracted and disposed of many years before, and the development of other ore therein of commercial value, should such exist, necessarily involved the risking of a large amount of money. The Anaconda Company, no doubt, could afford to take that risk—especially as the evidence shows that the exploration and development of the Alice properties could be made from the workings of some of its own properties—and it is reasonable to suppose that it had sufficient information to justify it in undertaking to do so. But the Alice Company, not only had no money with which to make such explorations and development, but was in debt, which indebtedness was necessarily gradually increasing. Its stock was nonassessable, and therefore its stockholders could not be made to furnish the money essential to any further exploration of its properties. In the course of his testimony, Ryan, the president of the company, said, among other things:

"There had been no operations on the Alice properties excepting leases since 1893. After the Butte Coalition Company acquired control of the stock, there was no change in the operations. The leases were carried on much the same as they had been theretofore; no direct company operation, except taking care of the property. We could not undertake to carry on any mining operations on the property. We had no money. The company was in debt when we took it over, and we had never seen any way of liquidating that debt. It was a nonassessable stock. We could not call on the shareholders for money, and we had no way of carrying on operations. We discussed the matter of borrowing money, offering bonds to the shareholders; but, in looking into the affairs, we could not see where we were justified to ask them for any money. The mine had been worked to a depth of about 1,500 feet, and, even with silver above $1 an ounce, had closed down. No one had ever been able to find a process that would make the zinc ore in the mine commercial, and there has never been known to be any copper in the mine, so we did not see what representations we could make to the shareholders to induce them to put up money to carry on operations."

The fact that the Butte Coalition Company owned 234,000 of the 400,000 shares into which the capital stock of the Alice Company was divided, which 234,000 shares were acquired by the former company from Ryan, and that he acquired them in large part from men also of large means, and that either or all of such owners might themselves have furnished or secured the money necessary for the further development of the properties, is, in our opinion, wholly unimportant. Conceding their ability to have done so, they were not obliged by any rule

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of law or equity to do it. The circumstances under which private corporations may sell and dispose by absolute conveyance of all of their property are thus stated in Thompson on Corporations (2d Ed.) § 2429:

"First. Private corporations, when expressly authorized by statute, charter, or by-laws, may sell and dispose of all the corporate property.

"Second. Private corporations, by the unanimous consent of all stockholders, in the absence of express prohibition, may sell and dispose of all corporate property.

"Third. The directors and managing officers have the power to dispose of all the property, where the governing statute provides that private corporations may sell their entire property.

"Fourth. Where the corporation is in failing circumstances, or is in fact insolvent, the directors and managing officers may dispose of all the property, or make an assignment of all the corporate property for the benefit of creditors.

"Fifth. The majority stockholders may alienate all the corporate property, when expressly authorized by statute, charter, or by-laws.

"Sixth. The majority stockholders, even as against the protest of the minority, may dispose of all the property when the corporate business has become unprofitable, and where it would be ruinous to the corporation and the stockholders to continue the business, or where there are insufficient funds to continue the business and no money with which to pay existing indebtedness, or when the corporation is in failing circumstances, or is in fact insolvent."

The purposes and powers of the Alice Company, as expressly stated in its articles of incorporation, have already been set out. By a statute of Utah enacted in 1905, after conferring certain powers on the corporations of the state, it is further provided:

"And any corporation now existing, or that hereafter may be organized under the laws of this state for the purpose of mining, or the exploration or development of mining property, including lands bearing metal, stones, limestone, oil, petroleum, asphalt, and other hydro-carbons, shall, in addition to the powers above enumerated, have the power to purchase, take on bond, or lease or in exchange, or locate, or otherwise acquire, any lands, mines, options, territory, fields, or claims, and to sell, convey, lease, bond, mortgage, dispose of, or otherwise deal in the same to such extent as the board of directors may deem prudent, subject always to the provisions of the articles of incorporation and by-laws: Provided, that in case the articles of incorporation do not provide for the sale or other disposition of the property of the corporation, then the act of the board of directors shall not be valid or binding on the corporation until confirmed by a vote of the majority in amount of the stock outstanding, at a meeting of the stockholders duly called to consider such action of the board. When the articles of association provide that the property of the corporation may be sold, mortgaged, or otherwise disposed of by the directors or by the stockholders, sales made in accordance therewith shall be binding on the company." Section 322, Compiled Statutes 1907.

The board of directors of a private corporation was by the common law authorized to sell or otherwise dispose of the property of the corporation, subject to the limitation that it could not sell or dispose of its entire property. Forrester v. B. & M. Co., 21 Mont. 544, 55 Pac. 229, 353; Thompson's Com. on Corp. vol. 3, p. 2421; Id. vol. 7, p. 8356; Noyes on Intercorporate Relations, §§ 114, 281. By the Utah statute referred to, the powers of all such corporations then existing or that should thereafter be organized under the laws of the state for any of the purposes therein enumerated were manifestly extended beyond the common-law powers, and under its express terms, in view of the charter of the Alice Company, we do not think it admits of doubt that the board of directors of the latter com-

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pany, in the absence of any fraud or lack of good faith, and with the consent of the majority of its stockholders, was empowered to sell and dispose of all of the property of that corporation.

[6, 7] It is true that at the time the Alice Company was incorporated the above-quoted provision of the Utah statute had not been enacted, but there was then in force a statutory provision of the territory authorizing the amendment, alteration, or repeal of the statute under which the company was incorporated (Comp. Laws Utah 1876, p. 232), which power was subsequently made a part of the fundamental law of the state (section 1, article 12, of the Constitution). Such reserved power, it was held by the Supreme Court of the state in the case of Garey v. St. Joe Mining Co., 32 Utah, 497, 91 Pac. 369, 12 L. R. A. (N. S.) 554, does not extend to an agreement, which the statute had permitted the stockholders of a corporation it had authorized to be incorporated to make among themselves, that its stock should be paid for in full and thereafter be nonassessable. But there was no agreement of that nature in the articles of incorporation of the Alice Company, by which, as has been seen, the corporation was given the general power to buy, lease, hold, own, operate, and sell, mines, mining claims, mills, mill sites, reduction and refining works, and to do all kinds of business incident to, connected with, or convenient for the management of a general mining business.

There is in the powers thus conferred by its charter on the Alice Company no express prohibition against the sale of all of the property of the corporation; nor is there in the case any express agreement either between the corporation and its stockholders, or between the stockholders themselves, that such a conveyance should not be made—the most that can be claimed in that regard being that a conveyance of all of the property of the corporation might terminate the business of the company and thus defeat the objects of its incorporation; but not necessarily so, for, as said by the Supreme Court of Montana in Forrester v. B. & M. Co., 21 Mont. 544, 559, 55 Pac. 229, 235:

"A transfer or other disposition of all its property will not ipso facto dissolve a corporation, although the practical effect thereof may be to defeat the object of its organization. This is so because ownership or possession of property is not essential to corporate existence. Gans v. Switzer, 9 Mont. 408, 24 Pac. 18; 9 Am. & Eng. Ency. Law (2d Ed.) 565. A flourishing mining corporation may desire to sell or otherwise dispose of its entire assets for the purpose of reinvesting the proceeds in a new enterprise within the corporate purposes, or of acquiring other mining property. Such sale or other disposition might be made at common law with the unanimous consent of the stockholders, without working a dissolution; nor would a dissolution be produced by the sale or assignment of the whole property of an insolvent corporation made by the directors, either with or without the consent thereto of all the stockholders therein."

In Thompson on Corporations, § 90, it is said:

"The reserve power of the Legislature extends, not only to altering the charter for any purpose connected with the public interests, but also to altering it for the mere purpose of changing the rights of the corporators as among themselves. This view has been taken in New York, in Massachusetts, in Illinois, in Missouri, and in other states. A necessary result of this doctrine is that the Legislature may authorize any change in the organization, purposes, or powers of the corporations which the majority might desire, contrary to the will of the minority."

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Upon that subject there is more or less conflict in the decisions of the courts; but we find it unnecessary to pursue or decide the question in this case, for the reasons already suggested. In the instant case the sale was made in exchange for stock in another corporation, with the intention by the board of directors of the Alice Company, as is claimed on behalf of the appellees, to thereafter apportion the stock so acquired among the stockholders of the company, or its cash value to such of them as preferred cash, and thereafter to wind up its business and disincorporate the company.

The appellees dispute both the validity of the exchange and the intent with which it was made; but we find it unnecessary to decide either of those questions, because of the views we entertain regarding the two remaining points presented by the record. It appears that Ryan was a director and the president of the Alice Company, the managing director of the Anaconda Company, a director and the president of the Amalgamated Company, and a director and the president of the Butte Coalition Company; that Thayer was a director and the president of the Anaconda Company, and a director of the Butte Coalition Company, while the latter company owned a large majority of the stock of the Alice Company, and 500,000 shares of the stock of the Anaconda Company. And although the trial court acquitted both Ryan and Thayer of any intentional wrong, saying in its opinion that it saw nothing to "inspire belief that they aimed at aught but fair bargaining, or that they designed injury to Alice and consciously abused their trust," yet said that, though the common directors were not a majority of either board, it—

"is a difference in degree, but not in principle. They may have dominated the board. In both cases is divided duty, conflicting interests, possible impaired judgment of unknown effect, difficulty of proof, and danger to stockholders. In either case, inadequacy of price is unfairness, and condemns without further inquiry in an attempt to determine whether due to corruption or honest, but mistaken, judgment unconsciously swayed by adverse interest. There is no safety otherwise."

[8] At the beginning of the suit Judge Hunt, in granting an injunction pending the litigation restraining the disposition by the Alice Company of the 30,000 shares of the stock of the Anaconda Company, held upon the showing then made that Ryan, as managing director of the Anaconda Company, "must have had some specific, detailed knowledge of ore bodies in the Alice, their extent, character, and value, which would warrant the payment of $1,300,000 for the property, is an irresistible inference. We all know that the science of mining has been so far advanced within the last 15 years that it enables engineers to express clear and definite opinion of mine values. Mere chances have given way to highly reasonable expectations based upon exploitation, study of geological conditions, assays, mineralogy, and improved commercial facilities for reducing ores," and further held (and, as we think, very correctly) that upon principle contracts between corporations having a common director should be regarded very much as are contracts between individual directors and their corporations, and that while such contracts are not prohibited, and are not prima facie void or fraudulent, they are voidable, and that the burden rests upon those who seek to

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sustain them to show clearly and satisfactorily that they are entirely fair and free from wrong—citing with approval what is said upon the subject in 2 Thompson on Corporations, §§ 1242, 1243.

[9] The trial court held that by the evidence given that burden was not sustained, with which conclusion we agree, not only because of the inadequacy of the consideration, but because it appears in part from Ryan's own testimony that all of the knowledge respecting the Alice properties within the possession of the buying corporation of which he was managing director was not communicated to the stockholders of the Alice Company, of which he was likewise a director and also its president, and whose directors it is manifest from the whole record he dominated. From his testimony we extract as follows:

"The price was fixed by general conference; in the matter of the Alice Company the price was fixed more or less arbitrarily. There was nothing in the value of the mines; there was nothing demonstrated that anybody could fix any value on. It was matter of trade between the representatives of both companies. Of course, when I closed out with Mr. Heinze, I was on one side, doing the best I could for the Amalgamated, and Mr. Heinze was doing the best he could for his company. When we traded with Clark, Mr. Clark was looking after the interests of his company, and I was looking after the interest of the Anaconda and the Amalgamated Company. The Alice Company appointed a committee to confer with a committee representing the other companies. I think the board of directors appointed the committee, and I was president of the board at the time. I don't remember who the members of the committee were. My associates upon the board, representing the Alice negotiations, were Mr. Carson and Mr. Thornton. They were the two that I relied on more than anybody else in the Alice Company. They were not connected with the Anaconda, or with any of the other Amalgamated companies; but they were directors of the Alice, both men of very good knowledge of the Butte camp and its history, and as good a knowledge as anybody had of the Alice Company. Mr. Carson was manager of the Lexington mills, the adjoining property to the Alice, for years when it was in operation, and just before it closed, and probably had as intimate knowledge of that important district and Lexington districts as anybody who was then living. I don't recall who represented the Anaconda Company. There were committees representing the different companies that were in negotiation for the purchase on the part of the Anaconda Company and for the sale on the part of the other companies. I don't know that Mr. Thornton, Mr. Carson, and myself agreed readily upon the price; but I don't recall any dispute. In reality, the price was arbitrarily fixed. It had to be. It could not be otherwise. The price was not fixed by me; neither the price on that or any of the other properties. I was very careful to see it was not. I realized that just such a question as this would be asked. I don't know that I would have so little common sense as to order on the part of the Alice Company, prior to the sale of the Anaconda, an investigation to be made by anybody to ascertain the then value of the Alice property. The Alice had no value, except as to its mine. The whole matter of the value of the Alice mine was discussed pro and con at the time I took that option, and, as I say, all the talent in our organization was criticizing me for taking that option. Nothing had developed after that time, up to the time of the transfers of these properties to the Anaconda Company, in the Alice mine, or on the Alice mine property, that was worthy of investigation. We all knew the development of the adjacent property in a way, and enough to guide us in our judgment as to the effect of that value on the Alice Company. The committee that were looking after the Alice end of the trade certainly satisfied themselves what they thought was a reasonable value for the property, and made investigations accordingly, I have no doubt. All of the committees representing all the companies did that; that being a part of the arrangement. * * * I produced the statement which you requested—Complainants' Exhibit A, October 7, 1913, showing the production of copper, silver, and gold of the Badger State mine

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since the commencement of operations on that property to June 30th of this year. At the present time the lowest level in the Badger State mine is approximately 2,000 feet in depth. The extraction of ore in commercial quantities began, I think, at about 1,200 feet. That vein is probably a continuation of the Jessie vein (one of the veins that crossed the property of the Alice Company). I think there was a lean zone in the North Butte property at about that depth; but the Jessie was worked and produced ore practically from the surface, not in the same high grade bodies that were encountered from about 900 down. I think the 2,000 and 2,200 foot levels in the North Butte—by common repute; I have never seen them myself—are not as good levels as above and below. I can tell you, from my mine report, that I have here the distances east and west of the working shaft of the Badger State that the developments have extended. On the 2,000-foot levels the workings extend easterly 74 feet and westerly 69 feet from the cross-cut. I cannot find any report of Professor Kemp and Mr. Keller and Mr. Klepetko bearing particularly on the Alice property. I am quite sure that they did not make a written report particularly on that property, because they were employed by the different companies in the Anaconda consolidation to value plants, to inspect workings, and to generally pass upon the value of operating properties, which, of course, was impossible in the case of the Alice, as there was no plant, and the workings were not accessible, on account of the mine being filled up with water, up to about the 700-foot level. So far as the Alice Company is concerned, there was no written report from any engineer on the property preparatory to, or anticipatory of, the sale. Mr. Thornton and Mr. Carson, both of whom are engineers with considerable experience in the valuation of mining properties, particularly in Butte, were directors of the Alice Company, and conferred with me as president of the company, and very largely determined the value of the property for the purposes of the trade. Professor Kemp did not make any report to the Alice Company. Of that I am certain. The circular to the stockholders, issued by the directors, was all the information the directors or anybody else had, and was sent to the stockholders previous to the meeting at which they were asked to vote on the acceptance or rejection of the offer of the Anaconda Company to buy the Alice property. I did not have specific information concerning the property from Mr. Buzzo [for years superintendent of the Alice Company]; but I had general information. Mr. Buzzo did not talk enthusiastically about the property, as I remember it; but he was very anxious to have the Alice property fall into the hands of some one who had money enough, or could find money enough, to open it up and develop it, in the hope that something could be developed to make it a valuable property. So far as I was able to judge, he gave me whatever information he had concerning the property."

We find in the record no evidence that Ryan ever conveyed to any of the complaining minority stockholders of the Alice Company any of the information concerning its property, or its probable or possible value, communicated to the Anaconda Company by the experts referred to in the foregoing testimony. And certainly there is no such information contained in the circular letter to the stockholders of the Alice Company, referred to by the witness as having been signed by him and its other directors, advising the acceptance of the proposition of the Anaconda Company, which circular letter we insert:

"New York City, New York, April 27, 1910.

"To the Stockholders of the Alice Gold & Silver Mining Company:

"You are advised that a special meeting of the stockholders of the company has been called to meet at the principal office of the company in the Utah Savings & Trust Building, Salt Lake City, Utah, on Friday, the 27th day of May, 1910, at the hour of 10 o'clock a. m. The purpose of the meeting is to submit to the consideration of the stockholders, and to have them pass upon, a proposed contract of sale between the company and the Anaconda Copper Mining Company of Montana. The proposition, if approved by the holders of the necessary amount of the capital stock of the company, will result in the sale and

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transfer of all of the property and assets of the company to the Anaconda Copper Mining Company, in consideration of the issuance and payment by the latter company of 30,000 shares of the full-paid capital stock of said company. In submitting this proposition to the stockholders, and advising its acceptance, the management wishes to state that the Alice Gold & Silver Mining Company was incorporated under the laws of Utah on the 16th day of March, 1880, with a capital stock of $10,000,000, divided into 400,000 shares, having a par value of $25 each, all of which stock was issued in acquiring certain mining properties near Walkerville, in the county of Silver Bow, state of Montana. The mines of the company were operated actively from 1880 until 1893, and afterwards for a short period during the years 1897 and 1898. The total dividends which were paid from March 15, 1881, to March 15, 1898, amounted to $1,075,000. During the period of active operation, silver was the chief product of the company. During the year 1893, because of the market decline in the market price of silver and the lean values of the ores which were developed in the lower levels of the company's mines, it became necessary to close down its property, and practically no operations have since been conducted by the company, and no revenues have been received, except a comparatively small sum realized from the royalties paid by lessees working in certain portions of the older levels of the mines. As a result of closing down the mines of the company, the same filled with water up to the 700-foot level, and the workings between that level and the 1,500-level have been and now are inaccessible. A balance sheet, showing the condition of the company on March 31, 1910, and a profit and loss account, showing the result of such operations as have been conducted by the present management, are attached hereto and marked respectively Exhibits A and B. In 1908 the Butte Coalition Mining Company acquired by purchase from the former owners a majority of the stock of the company. The market price of silver, taken in connection with the low grade of the ores exposed, has been such that the mines of the company could not be worked at a profit, and in view of the depleted condition of the treasury of the company the management has not felt justified in endeavoring to carry out any extensive system of prospecting or development work. Recently the stockholders of other companies, to wit, the Boston & Montana Consolidated Copper & Silver Mining Company, Washoe Copper Company, Big Blackfoot Lumber Company, Butte & Boston Consolidated Mining Company, Trenton Mining & Development Company, Red Metal Mining Company, Diamond Coal & Coke Company, and Parrot Silver & Copper Company, have taken steps to effect a consolidation of all the property owned by them, by a sale of their respective properties to the Anaconda Copper Mining Company, for certain amounts of the capital stock of the Anaconda Copper Mining Company, and the last-named company, in pursuance of the same general plan, has offered to purchase all of the property of this company, paying therefor 30,000 shares of the capital stock of the Anaconda Copper Mining Company. By the consolidation above referred to the Anaconda Copper Mining Company has acquired the most important mining ground in the Butte district, and it is believed that it will be enabled, through the adoption of general systems of drainage, ventilation, and development, to prospect in an economical manner the undeveloped portion of the property thus acquired. This company is the owner of comparatively large areas of mining property which lie contiguous to some of the property belonging to the Anaconda Copper Mining Company, and which it is believed are of sufficient value to justify prospecting and development, provided the same can be carried on by a company strong enough financially to [bear the] burden of so doing. In addition to the cost which the resumption of active mining operations would entail, you are advised that it would be necessary to construct and equip new mills or reduction works of modern design and suitable character to handle the ores of the company economically, provided such ores were encountered in sufficient quantity to justify the continuance of mining operations. Such action would require the expenditure of large sums of money, at present unavailable. You are therefore advised that in the opinion of the management it would be to the best interests of this company and its shareholders to accept the proposition of the Anaconda Copper Mining Company. You are therefore requested to sign the accompanying proxy and return it in the inclosed envelope, wheth-

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er you expect to be present at the meeting or not, in order that the stock owned by you may be represented and voted at the special meeting of the stockholders. Very respectfully, John D. Ryan, J. W. Allen, W. D. Thornton, A. C. Carson, E. S. Ferry, Board of Directors."

There is in the foregoing letter, not only none of the information derived by Ryan from the experts of the Anaconda and its associated companies respecting the actual probable or possible value of the properties of the Alice Company, nor any intimation of any intention of the board of directors of the latter company to wind up its business and obtain its dissolution, and, as a matter of fact, as the evidence shows, no move to that end was made until about one year after the sale and conveyance of all of the property of the company. The court below, having found that an adequate price had not been paid for the properties in question, for which reason the appellees had not sustained the burden resting upon them to show that the sale was a fair one, and having held that it could not be legally made in consideration of stock in the Anaconda Company, based upon its interpretation of the decision of the Supreme Court in the case of Mason v. Pewabic Mining Co., 133 U. S. 50, 10 Sup. Ct. 224, 33 L. Ed. 524, entered an interlocutory decree to the effect that the entire property be offered at public sale by the master of the court, upon prescribed notice, and that if an amount in excess of the value of the stock given for it by the Anaconda Company—which the court fixed at $1,500,000—was not bid for it, the sale should stand confirmed; and, it having subsequently been shown to the court that at the offer of the property at public sale as provided in and by the interlocutory decree no bid was made, the court entered the final decree affirming the sale.

I am unable to see that the decision of the Supreme Court in Mason v. Pewabic Mining Co. in any respect sustains such decree. In that case a corporation of Michigan, with a capital stock of 20,000 shares of the par value of $25 each, afterwards increased to 40,000 shares, had become dissolved by the expiration of its charter on April 4, 1883, notwithstanding which fact the directors, who were elected in March of that year, continued the ordinary business of the corporation, and, among other things, made an assessment of $88,000 on the capital stock, which was paid. On the 28th of March of the following year, at a meeting called "for the election of directors and for other purposes," these resolutions were adopted, against the vote and the protests of the complainants to the suit, who were minority stockholders of the old company:

"Resolved, that the board of directors be authorized to sell and dispose of the property of the company for a sum not less than $50,000; that the president and secretary be authorized to execute all conveyances necessary to carry out the contract for the sale of the property of this company made by the board of directors; and that the board of directors be, and hereby are, authorized to close up the business of the company.

"Resolved, that it is the sense of this meeting of stockholders that the property shall be sold to a new corporation, organized under the laws of Michigan, on the basis of 40,000 shares, and that the stock of such new corporation shall be issued to and received by the stockholders of this company in payment for the same, stockholders to have the right to receive [an] equal number of shares in [the] new company, if they so elect, on surrendering cer-

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tificates of this company, within 30 days after April 12, 1884, and in case a stockholder does not take stock of the new corporation he is to receive his pro rata share in money."

The vote in favor of the adoption of the resolutions was 27,919 shares, against 6,754 shares in the negative. A new corporation, called the Pewabic Copper Company, was thereupon organized under the laws of the same state, also with a capital stock of 40,000 shares, at $25 each, which was taken up by the defendant corporators, who, with two others, were named as the first directors, being the same persons who controlled the old company. The third article of this association declared that no cash is actually paid on the capital stock—the cash value of real and personal property conveyed to the company contemporaneously with its organization being the sum of $50,000. The bill prayed for an injunction and restraining order, forbidding the defendants from carrying out the purpose of transferring the property of the Pewabic Mining Company to the new corporation, and for the appointment of a receiver to take charge of the effects of the old company, that they might be sold, the debts of the company paid, and the remainder of the proceeds distributed among its stockholders. Upon the issues made and proof taken the trial court decreed that the business of the Pewabic Mining Company be wound up, and that all of its assets—

"be sold at public vendue for cash to the highest bidder: Provided, that if at such sale the bid for the aggregate of the property and assets should not be in excess of $50,000 above the amount of the debts of the company existing at the time of the sale, then the arrangement for the sale of such property, made at the stockholders' meeting in Boston on the 26th day of March, 1884, as set up in defendants' answer, shall be carried out under the direction of the special master, hereinafter designated, and as provided by the resolution adopted by the stockholders at said meeting."

The decree proceeded to refer the cause to a special master for these purposes and with these powers: That he should ascertain the assets, property, and debts of the company, and that after ascertaining and reporting the same to the court the master should proceed, upon giving the required notice, to sell the property at public sale to the highest bidder in one body, with a provision to the effect that, if the highest bid for such property at such sale should amount to more than $50,000 over and above the indebtedness of the company—

"then that the arrangement for the sale of said property, made at said meeting of the stockholders at Boston, must be set aside and held to be null and void, and the Pewabic Mining Company be enjoined perpetually from selling to the Pewabic Copper Company, and that company is enjoined from receiving its transfer of the property."

The decree further declared that the directors of the old company—

"are not liable to pay to complainants and other stockholders any money received by them since the expiration of the charter of said Pewabic Mining Company, April 4, 1883, and that an accounting by said defendant directors is hereby denied as to such expenditure made by them after the expiration of the charter."

This last provision of the decree in favor of the directors of the old company was reversed by the Supreme Court, while the other portions of the decree were by it affirmed; the court saying:

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"With regard to the main question, the power of the directors and of the majority of the corporation to sell all of the assets and property of the Pewabic Mining Company to the new corporation under the existing circumstances of this case, we concur with the Circuit Court. It is earnestly argued that the majority of the stockholders—such a relatively large majority in interest—have a right to control in this matter, especially as the corporation exists for no other purpose but that of winding up its affairs, and that, therefore, the majority should control in determining what is for the interest of the whole, and as to the best manner of effecting this object. It is further said that in the present case the dissenting stockholders are not compelled to enter into a new corporation with a new set of corporators, but have their option, if they do not choose to do this, to receive the value of their stock in money. It seems to us that there are two insurmountable objections to this view of the subject. The first of these is that the estimate of the value of the property which is to be transferred to the new corporation and the new set of stockholders is an arbitrary estimate made by this majority, and without any power on the part of the dissenting stockholders to take part, or to exercise any influence, in making this estimate. They are therefore reduced to the proposition that they must go into this new company, however much they may be convinced that it is not likely to be successful, or whatever other objections they may have to becoming members of that corporation, or they must receive for the property which they have in the old company a sum which is fixed by those who are buying them out. The injustice of this needs no comment. If this be established as a principle to govern the winding up of dissolving corporations, it places any unhappy minority, as regards the interest which they have in such corporation, under the absolute control of a majority, who may themselves, as in this case, constitute the new company, and become the purchasers of all the assets of the old company at their own valuation. The other objection is that there is no superior right in two or three men in the old company, who may hold a preponderance of the stock, to acquire an absolute control of the whole of it, in the way which may be to their interest, or which they may think to be for the interest of the whole. So far as any legal right is concerned, the minority of the stockholders has as much authority to say to the majority as the majority has to say to them: 'We have formed a new company to conduct the business of this old corporation, and we have fixed the value of the shares of the old corporation. We propose to take the whole of it, and pay you for your shares at that valuation, unless you come into the new corporation, taking shares in it in payment of your shares in the old one.' When the proposition is thus presented, in the light of an offer made by a very small minority to a very large majority, who object to it, the injustice of the proposition is readily seen; yet we know of no reason or authority why those holding a majority of the stock can place a value upon it at which a dissenting minority must sell, or do something else which they think is against their interest, more than a minority can do."

The court proceeded to liken the rights of the parties to that suit in regard to the assets of the dissolved corporation to those of a partnership on its dissolution, and concluded its opinion upon that point as follows:

"We do not say that there may not be circumstances presented to a court of chancery, which is winding up a dissolved corporation and distributing its assets, that will justify a decree ascertaining their value, or the value of certain parts of them, and making a distribution to partners or shareholders on that basis; but this is not the general rule by which the property in such cases is disposed of, in the absence of an agreement."

In all this I see nothing to justify the decree appealed from. There the corporation had ceased to exist. Its former directors had become trustees, whose duty it was to reduce the property of the corporation with all reasonable diligence into cash, and, after paying the legitimate

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indebtedness, to distribute the proceeds remaining among the stockholders. Instead of doing so, they organized a new corporation, to take over the property of the old one, and offered to award to the dissenting stockholders their proportionate shares of the stock of the new company, or to pay them for it on the basis of $50,000 for the entire property. In that case the minority stockholders of the corporation that had ceased to exist asked that its property be sold, and the court so decreed, but in doing so directed that in the event no bid in excess of $50,000 should be received that the resolution that has been referred to should be carried out, and payment made to the complainants on the basis of $50,000 as the value of the company's property; the defendants by their answer having continued their offer to pay on that basis. That portion of the decree awarding the complainants the protection mentioned does not appear to have been appealed from by either party, and was not reviewed by the Supreme Court. While affirming the order directing the sale, as has been seen, that portion of the decree appealed from which denied to the complainants an accounting by the trustees of the dissolved corporation was reversed.

Here the complainants were minority stockholders of an existing corporation, not asking for, but protesting against, the sale of its property. I think the cases wholly unlike, and am of the opinion that the judgment should be reversed, and the case remanded to the court below, with directions to enter a decree for the return to the Anaconda Copper Mining Company of the 30,000 shares of its capital stock, together with any and all dividends that have been paid thereon, and annulling the sale and conveyance to it of the properties of the Alice Gold & Silver Mining Company, the appellants to recover costs of suit.

How a sale of all of the property of a private corporation, for an inadequate price and which is otherwise unfair and wholly illegal, made by its board of directors with the consent of a majority of the stockholders, but in spite of the dissent of a minority of them, can be subsequently rendered legal by offering the property at public sale, to see if at such sale it will bring more, I am unable to understand. The offer at public auction of property of the nature of that here involved, even if there be bidders, is, in my judgment, but little, if any, test of its real value. Many courts have refused to permit evidence of what property brought at a judicial sale at public auction to be given in proof of value, while others, although admitting it, refer to it as only slight evidence. Martinett v. Maczkewicz, 59 N. J. Law, 11, 35 Atl. 662; In re McAusland (D. C.) 235 Fed. 189, 190; Rickards & Co. v. Bemis & Co. (Tex. Civ. App.) 78 S. W. 239; Street Ry. Co. v. Walsh, 197 Mo. 392, 94 S. W. 860.

In the present case there was no bidder at all; thus, according to the decision of a majority of this court, there was rendered legal and valid the sale and conveyance of the entire property of an existing corporation, which sale and conveyance it was found and adjudged by the court below, and is found and adjudged by this court, were at the time they were made unfair and wholly illegal.

From that conclusion I respectfully dissent.

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GILBERT, Circuit Judge (with whom concurs WOLVERTON, District Judge). We concur in the opinion of Judge ROSS, except in his conclusion that the sale to the Anaconda Company should be annulled.

[10, 11] It cannot be denied that the majority of the stockholders of the Alice Company had the right to sell the corporate property. After the sale, and at a meeting regularly called and held under the authority of the laws of Utah, the requisite number of the stockholders passed a resolution directing that the corporation be dissolved, its affairs wound up, and its assets distributed. The appellants had no power to prevent dissolution against the will of the majority. Nor had they the right to say that a sale should not be made to the Anaconda Company, if that company outbid others. They had, however, the right, and that right the court below secured to them, to have the property sold free from the effect of any unfair combination between the majority stockholders and the Anaconda Company.

[12] The court below followed the rule of Mason v. Pewabic Mining Co., 133 U. S. 50, 10 Sup. Ct. 224, 33 L. Ed. 524, which holds that any stockholder can require that, upon dissolution, the corporate property shall be sold to the highest bidder for cash, and not to another corporation in which the majority stockholders are interested, and on terms fixed by them. There is no essential difference in principle between that case and this, and no substantial difference in the facts. The only difference is that in the Pewabic Case the minority stockholders were in court, insisting on their right to a sale at public auction, while in the case at bar the minority assert that no sale whatever should be made. Upon the law and the facts they are in no position to prevent a sale, nor to thwart the purpose of the majority to sell to another corporation. When they subscribed to their stock, they assented to the laws of Utah governing the distribution of assets of corporations, and they must abide by them. Nor is any relevant distinction to be found in the fact, as asserted, that in the Pewabic Case the corporation had ceased to exist, while in the present case the corporation was still in existence. It is true that the charter of the Pewabic Mining Company had expired; but under the laws of Michigan it continued to be a body corporate, for all purposes except that of continuing in business, and among the permissible functions of its continued existence as prescribed by law was that of winding up its affairs, disposing of its property and dividing its capital stock. In 10 Cyc. 1302, it is said:

"So if, in the exercise of a sound discretion, the majority of the shareholders deem it expedient to do so, they may sell out the whole property of the corporation to a new corporation, taking payment in its shares, to be distributed among such of the old shareholders as may be willing to take them. * * * If it is conceded that such action on the part of the majority is lawful, then the principle follows that the judicial courts will not examine into the affairs of the corporation for the purpose of determining whether the action is expedient, or for the purpose of scanning the motives which have led to it."

In J. H. Lane & Co. v. Maple Cotton Mills Co., 226 Fed. 692, 141 C. C. A. 448, the Circuit Court of Appeals for the Fourth Circuit said:

"The courts cannot pass upon the question of expediency of dissolution and sale, for that is the very question which the Legislature has authorized the majority of the stockholders to decide. * * * The courts cannot say that

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the discretionary power of the majority, conferred by the statute, does not extend to the dissolution of a prosperous corporation, or to a dissolution which will probably result in practical consolidation by the purchase of the property by another corporation. The fact that the state has not provided for consolidation without a dissolution of the corporation and sale of the property by no means implies that there is any policy of the state against dissolution and sale resulting in consolidation."

The majority of the stockholders have rights which the court must recognize and protect. They have the right to retain the benefit of the sale already made unless a sale for a higher price can be made. This was the protection afforded the majority stockholders in the Pewabic Case, and it is here afforded by the decree of the court below.

The decree is affirmed.

(245 Fed. 244)

ASSOCIATED PRESS v. INTERNATIONAL NEWS SERVICE.

(Circuit Court of Appeals, Second Circuit. June 21, 1917.)

No. 270.

1. INJUNCTION ⟹63—SUBJECTS OF RELIEF —INDUCING BREACH OF CONTRACT.
   A membership news gathering association, such as the Associated Press, composed of members each of whom is, or represents, the publisher of a newspaper, is entitled to protection by injunction against acts of a competitor, inducing members to violate their contracts made by the charter and by-laws of the association, or the confidential relations created by their membership.
2. WORDS AND PHRASES—"NEWS."
   Facts, even after ascertainment, are not "news," unless they have that indefinable quality of interest which attracts public attention. Neither is news always synonymous with facts, in the sense of verity. The word "news" means no more (laying aside hoaxing and intentional falsehood) than apparently authentic reports of current events of interest.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, News.]
3. LITERARY PROPERTY ⟹1—PROPERTY ⟹2—SUBJECT-MATTER—NEWS.
   News, although not literary property, where it has a commercial value, is property, and as such entitled to legal protection.
4. NEWSPAPERS ⟹7—NEWS—PUBLICATION.
   The property right of a press association in news gathered from all parts of the world for distribution to its members for publication in different cities throughout the United States is not lost by publication in one or more localities, but such property remains in the association until all of its members have had the benefit of the service.
5. TRADE-MARKS AND TRADE-NAMES ⟹68—PROTECTION OF PROPERTY RIGHTS —NEWS.
   Complainant, the Associated Press, is a membership association for the gathering and distribution to its members, who are publishers of newspapers throughout the United States, of news, both foreign and domestic. It has no capital stock; but the expense of the service is borne ratably by the members. Defendant is a stock corporation, which gathers and distributes news to customers for profit. It induced certain members of complainant to give its agents access to news furnished by complainant, and also copied foreign news items furnished by complainant from bulle-

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tins and early editions of New York papers, and the news so obtained it sent out by wire to customers further west as its own. *Held*, that such acts were a fraudulent invasion of complainant's property rights, in the nature of unfair competition, against which complainant was entitled to an injunction.

6. WORDS AND PHRASES—"PUBLICATION."

The thought running through all the uses of the word "publication" is an advising of the public; a making known of something to them for a purpose.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Publication.]

Ward, Circuit Judge, dissenting in part.

Appeal from the District Court of the United States for the Southern District of New York.

Suit in equity by the Associated Press against the International News Service. From an order granting a preliminary injunction, both parties appeal. Modified.

For opinion below, see 240 Fed. 983.

Cross-appeals from order entered in District Court for Southern District of New York granting in part only the preliminary injunction moved for by plaintiff.

The writ in question (reduced to its lowest terms) restrains defendant from (1) procuring any agent or employé of plaintiff, or any of its members, to give or permit defendant to take, for a consideration or otherwise, any "news" received from or gathered for plaintiff, and from using or selling "any news so obtained." The injunction as granted also (2) enjoins defendant from procuring any newspaper represented by a member of plaintiff to violate any agreement established by the charter or by-laws of plaintiff. Defendant alleges as error the issuance of the writ above outlined.

Plaintiff's motion for relief asked for what the court below granted, and further that defendant be enjoined from "copying, transmitting, selling, using, or causing to be copied, etc., any of the news furnished by plaintiff, from bulletins or newspapers published by a member" of plaintiff, and also from "competing with plaintiff" or its members by the unfair methods set forth in the bill. Injunction in substantially this form having been refused, plaintiff's appeal assigns such refusal for error.

Plaintiff is chartered by New York, under a general statute known as the Membership Corporation Law (Consol. Laws, c. 35); an act used for the organization of clubs and the like. It has no capital stock, its membership is selective, its business is the gathering of news all over the world, and the very great expense of such acquisition and transmission of information is borne by ratable levy or assessment upon its "members." Such members are practically about 950 newspaper owners distributed over the United States; but, since such owners are frequently corporations, each corporate contributor must furnish a natural person to act as the legal member of this New York corporation. Such natural person is commonly called the "representative" of whatever newspaper he serves.

Defendant is a business corporation of New Jersey, has capital stock, is engaged as a rival in the same business as plaintiff, and seeks a profit by selling the news or information it acquires to customers, usually newspaper publishers.

Some publications are members of the Associated Press, and also customers of the International; but such double service is unusual. The parties hereto are undoubtedly in keen competition, as are usually the journals served by one or the other in any given city.

News received at a principal office of plaintiff is disseminated by telegraph or telephone to members at a distance, and (in the largest cities at all events) the offices of journals taking the fullest or largest Associated Press

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service contain a machine (furnished by plaintiff) of the printing telegraph type whereon the incoming news is shown automatically.

Every newspaper has, of course, a staff for the investigation of local happenings; if such paper is a member of plaintiff, it may be required to furnish to other members and through plaintiff the news of its locality. This is an important part of the Associated Press scheme of news acquisition, viz. the co-operative feature.

Plaintiff's by-laws explicitly forbid any member from imparting to any one Associated Press news "in advance of publication," or to "conduct his business in such a manner" that such news so furnished to him "may be communicated to any person, firm, corporation, or association not entitled to receive the same"—i. e., any one not in good standing with and in the Associated Press. The by-laws fix times of the day before which publication of members' newspapers shall not occur, but the exhibition of bulletins at its offices within each paper's own territory is not a violation of these rules.

The business of gathering, stating, transmitting, and selling statements of fact as "news" did not originate with either party hereto, and the general methods of journalists in regard to this department of activity are not in dispute, although (as appears hereafter) argument is hung on one old prevalent and undisputed habit of newsgatherers.

The principal facts upon which the court below based the first head of injunction are that in Cleveland, Ohio, is published a newspaper which has Associated Press membership, and had for a considerable time in its employ a "telegraph editor," who would naturally receive incoming Associated Press items. This man (in accordance with by-laws) was charged with the transmission to plaintiff of Cleveland news possessed of more than local interest, and (properly) received pay from plaintiff for so doing. Defendant corrupted this editor to apprise its agents of what he thus learned, and disseminated such news as the result of its own legitimate labor.

The second head of injunction is based on the fact that there is in New York City a newspaper which has the service of both plaintiff and defendant. In its publication office is one of the printing telegraph machines aforesaid, and the managers of said newspaper were induced to permit agents of defendant to enter their office, read what was "coming in" on the machine, and use the information thus acquired as the basis for telegraphic and other items, represented as the gatherings of its own employés from original sources, or at least they were not otherwise marked or described.

The material facts on which plaintiff moved for such injunctive relief as was refused below are undisputed and as follows:

The natural place for receiving news from Europe (and indeed beyond) is the Atlantic seaboard, and especially New York. Bulletins and early editions, put out by members of plaintiff in the seaboard cities, are read by agents of defendant, and the substance thereof transmitted by wire westward, sold to defendant's customers, and by them printed, perhaps without any knowledge on their part that the origin of and sole basis for defendant's dispatch is (e. g.) a bulletin posted in New York by a member of plaintiff, as the result of plaintiff's efforts, and certainly without any such information given them by defendant. That this practice obtains the answer admits, and justifies the same as matter of law, while alleging (in substance) that it is no more than a part or legitimate outgrowth of the newspaper habit of utilizing "tips."

This word signifies a bare intimation that something has happened. When such "tip" has been verified by independent investigation on the part of the person receiving it, the facts may be and are disseminated as discovered by the journal or news agency getting the "tip." This practice may, we believe, be regarded as universal in newsgathering circles. The District Judge did not consider the utilization of "tips" as having any necessary bearing on the bodily appropriation and sale of news from early editions and bulletins, and felt satisfied that as matter of law plaintiff should have all the relief demanded, but, regarding this last question as to the effect of "publication" by an Associated Press paper as one of first impression, refused the third demand of plaintiff, and remitted the matter to this court.

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Peter S. Grosscup, of Chicago, Ill. (Fred. B. Jennings and Winfred T. Denison, both of New York City, on the brief), for plaintiff.

Samuel Untermyer and William A. De Ford, both of New York City (Henry A. Wise, of New York City, on the brief), for defendant.

Before WARD, ROGERS and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). Defendant does not admit the facts above stated, as to procuring news from a telegraph machine in the office of a publisher; we think them fairly and fully proven. The evidence adduced for the defense on all the other points above mentioned amounts to an assertion that what defendant is accused of wrongfully doing plaintiff itself does and has done, and it is, indeed, a part of the newsgathering trade. Upon these propositions of fact are rested the conclusions that (1) if the acts are wrong, plaintiff cannot ask relief in equity when its own hands are unclean; and (2) if they are not wrong, i. e., illegal, no ground for relief exists. In our opinion the facts concerning the Cleveland episode are proved as stated; the plaintiff does not and has not copied and sold news from bulletins, etc., of papers using defendant's service; and the "tip" habit, though discouraged by plaintiff, is incurably journalistic.

[1] If the facts are as we have now found them, no party asserts that the acts restrained by the injunction as issued can be justified, either in law or morals. The right to proceed in equity to restrain inducing to breach of contract we have recognized in American, etc., Co. v. Keitel, 209 Fed. 351, 126 C. C. A. 277; and the inequity of seeking profit by procuring the breach of any confidential relation by an employé is fully considered in Peabody v. Norfolk, 98 Mass. 452, 96 Am. Dec. 664, and Dodge Co. v. Construction, etc., Co., 183 Mass. 62, 66 N. E. 204, 60 L. R. A. 810, 97 Am. St. Rep. 412. The relations (inter sese) of the members of the Associated Press are quite as confidential as those of master and trusted servant; the same reasoning applies. The order, so far as attacked by defendant's appeal, we consider granted in the fair exercise of discretion, and therefore proper.

Plaintiff's appeal, being from a refusal to grant injunction pendente lite, is of an infrequent kind; but still more rare is the presentation by such appeal of a clear-cut question of law, upon undisputed facts, largely admitted in the pleadings. These facts enable us to render opinion without danger of even seeming to trench upon discretionary matters. We are practically requested to act by the District Court itself.

There is no difficulty in discriminating between the utilization of "tips" and the bodily appropriation of another's labor in accumulating and stating information. As a matter of fact, one who, on hearing a rumor or assertion, investigates and verifies it, whether with much or little effort, acquires knowledge by processes of his own; the result is his. In all the relations of life, most of what most of us say we know is but the result of verifying "tips," given, consciously or unconsciously, by those in our environment. As a matter of law or rule, it is impossible to say in advance what measure of investigation or verification must satisfy the censor, and the law does not seek to compel the vain or impossible. Doubtless there have been, and will be again, instances where

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the asserted or pretended investigation is but an excuse for appropriation, where no reasonable man would believe that any effort had been made, except to conceal the absence of original work, but no such case is before us.

What is before us, and on the pleadings, is whether it is lawful, and, if unlawful, whether equity affords a remedy, for the admitted practice or habit of appropriating from bulletins and early editions the result of plaintiff's labors, and selling or otherwise gainfully using the same, either in the plaintiff's form or after passing it under the hand of a "rewrite" man. This adjective is the trade description of one who changes the language or sequence of some composition of words; his labors do not change the substance, and are immaterial to the present controversy.

Defendant justifies bodily appropriation without independent investigation, because (1) all plaintiff ever has in possession or for communication are facts; (2) all defendant takes are facts, and (3) there can be no property in facts; but (4) if there be any such property it is lost at the moment any member of plaintiff, in accordance with its own rules, publishes said facts by showing a bulletin or distributing an edition.

Plaintiff replies that it is (a) untrue that facts alone constitute its stock in trade; it deals in news; and (b) in news there is a property right recognized by reason and authority. Further (c) such property right inures to and persists in the plaintiff entity and each one of its members, and (d) is not exhausted by the act of a single member, which act is (e) improperly called by defendant "publication," a word inappropriate to "news," which is not literary property. Finally (f) plaintiff complains of defendant's admitted practices as unfair competition.

[2] (1, 2, a) With the existence of a truth, with physical facts per se, neither plaintiff nor defendant is concerned; for them facts in that absolute sense are but as ore in a mountain or fish in the sea—valueless unless and until by labor mined or caught for use. Nor are facts, even after ascertainment, news, unless they have that indefinable quality of interest, which attracts public attention. Neither is news always synonymous with facts, in the sense of verity; indeed, much news ultimately proves fictitious, yet it is excellent news notwithstanding. The word means no more (laying aside hoaxing and intentional falsehood) than apparently authentic reports of current events of interest.

When one copies a statement from a bulletin, he cannot assert himself to be possessed of any certain fact other than that of his own appropriation. The only fact he knows is that the bulletin maker made an assertion; but he has taken the news, because that is what the bulletin proclaimed, if its maker was skillful in his business.

[3] (3, b) Whether there is or can be any property in facts per se, any more than there is in ideas or mental concepts, is a metaphysical query that can be laid aside; for there is no doubt, either on reason or authority, that there is a property right in news capable of and entitled to legal protection. Property, nomen generalissimum, covers everything that has an exchangeable value (The Slaughter House Cases, 16 Wall. 127, 19 L. Ed. 915); that news possesses the quality stated,

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seems obvious enough, when it is observed that defendant takes it, in order to exchange it against dollars.

Special or trade news of divers kinds constitute property, as has often been decided (Hunt v. Cotton Exchange, 205 U. S. at 322, 27 Sup. Ct. 529, 51 L. Ed. 821; Dr. Miles Co. v. Park, 220 U. S. at 402, 31 Sup. Ct. 376, 55 L. Ed. 502; Board of Trade v. Christie Co., 198 U. S. 236, 25 Sup. Ct. 637, 49 L. Ed. 1031, affirming Board of Trade v. Kinsey, 130 Fed. 507, 64 C. C. A. 669, 69 L. R. A. 59, and citing with approval National Telegraph, etc., Co. v. Western Union Co., 119 Fed. 294, 56 C. C. A. 198, 60 L. R. A. 805; Dodge Co. v. Construction, etc., Co., 183 Mass. 62, 66 N. E. 204, 60 L. R. A. 810, 97 Am. St. Rep. 412; Exchange, etc., Co. v. Central, etc., Co., 2 Chan. [1897] 48; Kiernan v. Manhattan, etc., Co., 50 How. Prac. [N. Y.] 194; Board of Trade v. Cella, etc., Co., 145 Fed. 28, 76 C. C. A. 28); and the point was assumed as settled by us in Board of Trade v. Tucker, 221 Fed. 305, 137 C. C. A. 255.

There is no distinction entailing a legal difference, between news of the prices of corporate securities or commodities, of sporting events, or opportunities of profitable contracting, and news of current political, social, or national events. Both require labor and expense in acquisition, transmission, and dissemination, both have exchangeable values, and all alike lose by exposure the quality of news, which, when it becomes history, may remain important, but its commercial value has largely gone.

In the National Telegraph Case, 119 Fed. 300, 56 C. C. A. 198, 60 L. R. A. 805, the property rights of the "great news agencies" were referred to as existing for the same reasons as obtained in respect of market quotations, and, as we have indicated, that decision was approvingly cited by the Supreme Court in the decision which we think settled the general proposition that all news as commercially sold is property. 198 U. S. 236, 25 Sup. Ct. 637, 49 L. Ed. 1031.

Assuming, now, the existence at some time of some property right in plaintiff and to its news, the qualities producing exchangeable value may be noted. Regularity and reliability, the fruits of organization and expenditure, are of course necessary; but all that is vain unless the news is fresh, early, and, if not always first in point of time, as prompt as any. Time is of the essence, and the basic question on this branch of the discussion is: How long does the property quality endure in news?

[4] (4, c, d, e) Plaintiff is a membership corporation, its members co-operate in newsgathering, and each has in his own locality a several right to and ownership in the results of plaintiff's labors, viz. the news. The rights of members, whether printing in Duluth or Galveston, New York or San Francisco, are equal, and the aggregate of their rights is the plaintiff's right. If it be admitted that plaintiff's right of property in its news once existed, such existence was for the benefit of all its members, who, however (owing to the earth's method of rotation), cannot simultaneously exercise their several rights. Yet all exercise them at the same hour of their several days.

It is sought, if not to limit the doctrine of property in news to the time during which it remains locked up in the breast of its gatherer,

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to interpret the decisions cited as meaning only that news is "like a trade secret" (198 U. S. 250, 25 Sup. Ct. 637, 49 L. Ed. 1031), lost when divulged in the course of business. Doubtless the analogy of restraining in equity wrongful knowledge of private business methods was very useful in developing the doctrine that the "courts ought to protect in every reasonable way" the "valuable right of property" in information. Dodge Co. v. Construction, etc., Co., supra. But news is far more than a trade secret, for that must remain private to have its best value, while news is obtained for publicity alone. The true line of decision is indicated by the conclusion of the court in the Christie Case—that the "information will not become public property until the plaintiff has gained his reward." 198 U. S. 251, 25 Sup. Ct. 637, 49 L. Ed. 1031. Of course, this means his reasonable reward, and, as in that instance of trade quotations, divulging the same to one patron's office full of customers did not reasonably terminate plaintiff's property, so here it is reasonable and just that each member of plaintiff and plaintiff itself should have a property right in its news until the reasonable reward of each member is received, and that means (with due allowance for the earth's rotation) until plaintiff's most Western member has enjoyed his reward, which is, not to have his local competitor supplied in time for competition with what he has paid for. Surely this is a modest limit of rights.

But the foregoing is thought to be avoided, if not controverted, by dwelling on the word "publication," and insisting in substance that when (e. g.) a single New York paper (being a member of plaintiff) prints an item and sells a copy of that edition, all the world can copy as it pleases, to any extent and for any purpose, commercial or otherwise, because nothing but copyright protects that paper, and copyright does not cover statements of fact, but merely their literary dress or form.

[6] The argument assumes that what plaintiff is interested in, and is trying to preserve, is literary property, or anything capable of copyright protection. It may be granted that the newspaper first giving out the news in question is copyrighted, that fact statements are not thereby protected as such, and that publication at common law terminated an author's rights in his manuscript and the fruits of his brain;[1] yet it still remains true that plaintiff's property in news is not literary at all, that it is not capable of copyright, and that "publication," as that word is used in the long line of decisions regarding literary rights, has no determinative bearing on this case. No one before ever attributed to publication a sense that would limit a lawful business to a few degrees of longitude. The word is legally very old, and of no one certain meaning. Publication of evidence in equity or admiralty, of banns, of libel, etc., bears but remote relation to the act which is thought once to have terminated an author's property, and now is a requisite to statutory copy-

[1] This is the general view. Werckmeister v. American, etc., Co., 134 Fed. 321, 69 C. C. A. 553, 68 L. R. A. 591; Tribune Co. v. Associated Press (C. C.) 116 Fed. at 127; Holmes v. Hurst, 174 U. S. 85, 19 Sup. Ct. 606, 43 L. Ed. 904. The opposite opinion is divertingly sustained by Mr. Augustine Birrell in "Authors in Court," found among "Res Judicatæ."

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right. The thought, however, running through all the uses of the word, is an advising of the public, a making known of something to them for a purpose. It follows that the crucial inquiry is as to that purpose: Is it lawful?

In all the "quotation" cases, it was held that the purpose of the publicity given was not to let other people sell the quotations, and that that purpose was lawful.[2] As we put it in the Tucker Case, 221 Fed. 307, 137 C. C. A. 255:

"The posting of * * * quotations on a blackboard * * * is not the sort of publication which will terminate complainant's property right in them."

Thus it appears that not all publications are alike, and this is true, even under the Copyright Acts. In Werckmeister v. American, etc., Co., 134 Fed. 321, 69 C. C. A. 553, 68 L. R. A. 591, an opinion by Townsend, J., of which it has been said that it "left little to be added to the discussion" (American Tobacco Co. v. Werckmeister, 207 U. S. 299, 28 Sup. Ct. 72, 52 L. Ed. 208, 12 Ann. Cas. 595), that learned judge said that the use of "publication" without explanation or qualification was unfortunate. "The nature of the property in question in large measure determines the extent of public right." And it was held that unless there was an "abandonment of copyright or dedication to the public," the owner of a thing capable of copyright could "expressly or by implication confine the enjoyment of such subject to some occasion or definite purpose."

We have assumed the newspaper first printing to be copyrighted, and no doubt its publication of its early edition was a general publication; but it could not copyright, abandon, nor destroy what it did not own, and it did not own plaintiff's property in the news, nor that of its own fellow members in California. It did own the right to print in New York, but we discover no magic in the word "publication" which takes away or terminates the rights of others.

Plaintiff's purpose in furnishing the (e. g.) New York paper with news was to have a use made of it not inconsistent with its own reasonable reward for its labor from its property and that of all the other members of plaintiff. That measure of use and reward is lawful; defendant deprives plaintiff thereof, and can show no equities; therefore defendant should be enjoined.

[5] (f) Unfair competition, like all oft-uttered legal phrases, has acquired rather a narrow use. In McLean v. Fleming, 96 U. S. 251, 24 L. Ed. 828, a decision which is near the foundation of American case law on this subject, it was said that what equity enjoins the wrongdoer from depriving another of is "the advantage of celebrity." This thought has led to the feeling that what a plaintiff must be robbed of is the good will and business ease resulting from his well-known name, or the attractive dressing, wrapping, or form of his product; that such robbery must be by imitation; and that the test of such imitation is the effect upon the public, or that part thereof likely to require wares such as those in controversy.

[2] Board of Trade v. McDearmott (C. C.) 143 Fed. 188, is probably the most extreme instance of publicity, not amounting to abandonment, i. e., to the kind of "publication" here contended for.

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But this is not all the law, nor the only sort of unfairness in business methods, practiced by a competitor, and resulting in a continuing tort, for which the law affords no adequate remedy—that comes under the condemnation of equity. If defendant appropriated from an early edition of a New York paper what it wanted, and sold it, as extracted from said newspaper or as obtained per Associated Press, such action would still be obnoxious to what we have said concerning plaintiff's property rights in the news procured by itself; but, since no deception would be wrought upon the public, no action for unfair competition would lie along the lines just indicated. When and if such appropriated news is sold as the fruit of defendant's own efforts, and under its own name, it is a plain case of deception, assuming defendant's customers to be honorable men, anxious for good wares; an assumption necessarily made, in the absence of evidence to the contrary. Yet an action of such nature would lack the element of imitation, usually relied upon.

Equity, however, is not stayed because a name does not fit, or one is not at hand to accurately describe a wrong of a kind necessarily infrequent. If defendant takes what some one else owns, and sells it as of right, in rivalry with the owner, such competition is more than unfair; it is patently unlawful and the wider term comprises the narrower. But, laying aside the right of property as the ultimate foundation of suit, the business method of selling, in competition with plaintiff and its members, something falsely represented as gathered by defendant otherwise than from bulletins and early editions, is unfair, because it is parasitic and untrue. It is immoral, and that is usually unfair to some one.[3]

The flexibility of equity in granting relief against unfair methods of business was well stated by Ingraham, J., in Burrow v. Marceau, 124 App. Div. 665, 109 N. Y. Supp. 105:

"No hard and fast rule can be laid down, * * * where it is clearly established that an attempt is being made by one person to get the business of another by * * * fraud and deceit a court of equity will" intervene.[4]

And in Weinstock v. Marks, 109 Cal. 529, 42 Pac. 142, 30 L. R. A. 182, 50 Am. St. Rep. 57, it was said:

"Equity does not concern itself about the means by which wrong is done; it deals with the result of the fraud, which moves the arm of the law and strikes down all efforts, where fraud is practiced in securing the trade of a rival dealer."

To commercially distribute news not gathered by the sender is under the facts shown here an invasion of property rights; to send it out as one's own labor is marked by that dolus which is fraud, and that is the basis of the doctrine of unfair competition in its wide sense.

[3] Decisions granting relief from competition without the usual imitation elements, but with the fraud apparent, are Morgan v. Wendover, 43 Fed. 420, 10 L. R. A. 283; American, etc., Co. v. De Lee, 67 Fed. 329; Barnes v. Pierce (C. C.) 164 Fed. 213; Fonotipia Co. v. Bradley (C. C.) 171 Fed. 951; Prest-o-Lite v. Davis (C. C.) 209 Fed. 917, affirmed 215 Fed. 349, 131 C. C. A. 491; Prest-o-Lite v. Heiden, 219 Fed. 845, 135 C. C. A. 515, L. R. A. 1915F, 945.

[4] See this principle applied to enjoin a competitor from imitating the fashion of a model gown, bought from plaintiff by pretending to be an intending wearer. Montegut v. Hickson, 164 N. Y. Supp. 858.

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Since (to summarize the matter) any bodily taking for sale of plaintiff's news, without other labor than the perception thereof, before the reasonable reward of industry is secured as above indicated, is an unlawful invasion of property rights, and any sale thereof in competition with plaintiff under pretense of individual gathering thereof is a tort of the nature of unfair competition, the plaintiff's motion for injunction should have been granted substantially as made.

The order appealed from is modified, as indicated, and the cause remanded, with directions to issue injunction against any bodily taking of the words or substance of plaintiff's news, until its commercial value as news has, in the opinion of the District Court, passed away. The exact form of words to be used, and the insertion or omission of a definite time limit on copying and sale, will be settled in the court below in any manner not inconsistent with this opinion. One bill of costs in this court to plaintiff.

WARD, Circuit Judge (dissenting in part). A distributor of news —that is, of his information about things that have happened—neither invents, nor composes, nor manufactures anything; nor does he supply something which the public buys because it believes it originates with him and wants his article; nor does he own the news, but only his knowledge of the news. Therefore analogies from property created or protected by the patent, copyright, or trade-mark statutes, or by the principles regulating unfair competition, are wholly inapplicable. The distributor's knowledge of news which he has gathered is his property, so long as he keeps it to himself or communicates it only to others on condition that they will do so. He will be protected against any one who surreptitiously obtains this information from one of his members, subscribers, or employés, or by any form of pilfering or unfair means. Such were the cases of Kiernan v. Manhattan Co., 50 How. Prac. (N. Y.) 194; Exchange Co. v. Gregory, 1 Q. B. D. (1896) 147; Exchange Co. v. Central Co., 2 Chancery (1897) 48; Peabody v. Norfolk, 98 Mass. 452, 96 Am. Dec. 664; Dodge Co. v. Construction Co., 183 Mass. 62, 66 N. E. 204, 60 L. R. A. 810, 97 Am. St. Rep. 412; Board of Trade v. Hadden Co. (C. C.) 109 Fed. 705; National News Co. v. W. U. T. Co., 119 Fed. 294, 56 C. C. A. 198, 60 L. R. A. 805; Illinois Commission v. Cleveland Tel. Co., 119 Fed. 301, 56 C. C. A. 205; Board of Trade v. Christie, 198 U. S. 236, 25 Sup. Ct. 637, 49 L. Ed. 1031; Board of Trade v. Cella, 145 Fed. 28, 76 C. C. A. 28; Board of Trade v. Tucker, 221 Fed. 305, 137 C. C. A. 255; Hunt v. Cotton Exchange, 205 U. S. 333, 27 Sup. Ct. 529, 51 L. Ed. 821. In every one of these cases the court found that the defendant got the news or the quotations surreptitiously, and enjoined him for that reason. They abundantly support an injunction on the first grounds mentioned in the opinion of the court.

But if the distributor publishes, to use a word in this connection which I think has been unreasonably criticized, or abandons or dedicates or communicates his information to the world, his right of property in his information and his right to be protected against the

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use of it is gone. The Supreme Court in the Christie Case, supra, 198 U. S. 250, 25 Sup. Ct. 637, 49 L. Ed. 1031, likened property in news to property in trade secrets. The two are strikingly similar. The owner of a trade secret will be given protection against any breach of confidence in respect to it by his employés and against any dishonest discovery of it by third parties. If, however, he communicates the secret to another without condition, or if any one by his own efforts, for instance, by analysis of a secret compound, learns how it is made, such person may use it without any accountability to the original discoverer. That the discoverer spent much time and money in discovering the secret would not be regarded as a reason why such persons, learning it honestly, should not make use of it.

In this case the complainant furnishes news to its members for the express purpose of their putting it on their bulletin boards and issuing it to the public in their newspapers. This is what they live on. After this it seems to me pure fiction to say that any property in the distributor survives. Everything in the nature of a confidence about the communication has ceased. That the rotation of the earth is slower than the electric current is a physical fact the complainant must reckon with in doing its business. That news dedicated to the public with the complainant's consent by the morning newspapers in New York can be telegraphed in time to appear in the morning newspapers of San Francisco cannot qualify the legal effect of the dedication.

There being not the least evidence of anything fraudulent or underhanded in this method of obtaining news, I think the injunction should be denied.

(245 Fed. 254)

A. G. WINEMAN & SONS v. REEVES et al.

(Circuit Court of Appeals. Fifth Circuit. October 4, 1917.)

No. 2904.

1. ACTION ⟹37—ERROR AS TO FORM—TRANSFER.

Under equity rule 22 (198 Fed. xxiv, 115 C. C. A. xxiv), providing that, if it shall appear that a suit commenced in equity should have been brought on the law side of the court, it shall be forthwith transferred to the law side, if the right asserted by plaintiffs was the legal title to land shown to be in defendant's possession, and what they sought was the possession and enjoyment of such land, this would not have justified the dismissal of a bill in equity, but the suit should have been ordered transferred to the law side of the court.

2. COURTS ⟹262(3)—FEDERAL COURTS—EQUITY JURISDICTION—INADEQUACY OF LEGAL REMEDY.

Where plaintiffs had legal title to uninclosed timber river bottom land and the right to its possession, and had such possession thereof as the character of the land made reasonably practicable, and defendants were not in possession thereof, but, under unfounded claims of ownership, had trespassed upon and got timber from it, and, unless enjoined, would continue to do so, the remedy at law was inadequate, so as to authorize the maintenance of a bill in equity to declare defendant's claims of title void and confirm plaintiffs' title.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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3. COURTS ⟹262(3)—FEDERAL COURTS—EQUITY JURISDICTION—INADEQUACY OF LEGAL REMEDY.

Under Code Miss. 1906, §§ 549–552, permitting a bill to be maintained to confirm plaintiffs' title to land claimed by defendant, whether plaintiffs are in possession or not, such enlargement of equitable right may be enforced in a federal court of equity, unless plaintiffs have an adequate and equally efficient remedy at law.

4. STATES ⟹12(2)—BOUNDARIES—STREAMS.

The rule that a riparian proprietor of land bounded by a stream, the banks of which are changed by the gradual and imperceptible process of accretion or erosion, continues to hold to the stream as his boundary, but that, where the stream suddenly and perceptibly abandons its old channel, the boundary remains at the former line, is equally applicable to the boundary between two states.

5. STATES ⟹12(2)—BOUNDARIES—STREAMS.

Where the Mississippi river's change of its main channel from the route around a bend to a route through a chute intersecting the peninsula formed by the bend was due to a distinctly manifested diversion of a larger volume of water through the chute, and its action was visible and violent, and accompanied by the rapid caving of the banks of the chute and the carrying away of adjacent soil, with the timber on it, and cattle were carried off by the torrent, with the land on which they happened to be, there was such a change in the channel of the river as had no effect upon the boundary between the states of Mississippi and Arkansas.

6. NAVIGABLE WATERS ⟹44(3)—STATES ⟹12(2)—BOUNDARIES—ACCRETIONS.

Where the Mississippi river suddenly abandoned its old channel and formed a new channel, so that a considerable body of land formerly on one side of the river was thereafter on the other, the center line of the old channel, which before was a boundary subject to change of location by accretion and erosion, became a fixed and unvarying boundary, unaffected by changes afterwards occurring in either the new channel or in the old bed of the river, though under water, and gradual and imperceptible accretions to the Arkansas shore line of the old channel did not enlarge the state of Arkansas, or diminish the area of the state of Mississippi, or add to or lessen what was included within the boundary lines of the subdivisions of land in the two states which were contiguous and had the old channel as a common boundary.

Appeal from the District Court of the United States for the Northern District of Mississippi; Henry C. Niles, Judge.

Suit by A. G. Wineman & Sons against W. D. Reeves and others. From a decree dismissing the bill, plaintiffs appeal. Reversed and remanded.

Gerald Fitz Gerald, of Clarksdale, Miss. (George F. Maynard, of Clarksdale, Miss., and Hugh C. Watson, of Greenville, Miss., on the brief), for appellant.

D. A. Scott, of Clarksdale, Miss., F. A. Montgomery, of Tunica, Miss., and J. B. Daggett, of Marianna, Ark., for appellees.

Before PARDEE and WALKER, Circuit Judges, and FOSTER, District Judge.

WALKER, Circuit Judge. The appellants, A. G. Wineman & Sons, brought two suits, one of them in the chancery court of Tunica county, Miss., against W. D. Reeves, J. D. Asher, John P. Moore, and A. C. Sexton, the bill in which averred that the complainants are the true and lawful owners of described lands, including accretions thereto, al-

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leged to be in said Tunica county, that the defendants falsely claim to own part of said lands and timber growing on parts thereof, and under said claims have been entering upon said lands and cutting and removing timber therefrom, and, unless restrained, will continue so to do; and the bill prayed that the claims of title asserted by the defendants be declared void and held for naught, and that the title of the complainants to said land, including accretions and standing timber, be in all things confirmed. The other suit was one in replevin, brought against the appellee J. D. Asher in the circuit court of the same county for the recovery of logs cut from land described in the bill in the first-mentioned suit. Each of the suits was removed to the United States District Court for the Northern District of Mississippi. In that court, by agreement of the parties, the two suits were consolidated and tried as one; the agreement providing that the decision in the consolidated suit should be binding and conclusive on all the parties to both suits. The result of such trial was a decree dismissing the appellants' bill of complaint; that decree reciting that, the court "being satisfied that none of the lands in controversy, as described in the pleadings, are now, or were at the commencement of this suit, located and situated in the state of Mississippi; that said lands were formed by changes in the channel of the Mississippi river, caused by gradual erosion of the Mississippi shore, and were not formed by avulsion, and are accretions to the original lands on the Arkansas shore, and all of said lands are located and situated in the state of Arkansas; and that the plaintiffs are not owners of the land in controversy, and are not entitled to the relief prayed for, or to any other relief whatsoever." The appeal is from this decree.

The main channel of the Mississippi river as it was in 1824, when the Arkansas shore opposite Tunica county, Miss., was surveyed and platted, and in 1836, when the Mississippi shore, including that of Tunica county, was surveyed and platted, and as it remained for many years afterwards, except for slight changes, due to accretions to one shore and erosions from the other, went, in the direction of the flow of the water, around a bend, called Walnut Bend, turning from the westerly direction it had before the bend was reached to a northwesterly direction, and then turning again and going in a southerly direction. The result was that the land within the bend was a peninsula, extending from the Mississippi mainland in a northerly direction, except that there were two chutes, the northerly one called Whisky Chute, and the one farther south called Bordeaux Chute, through which there was, except when the river was quite low, some flow of water from the part of the river in the upper reach of the bend to the part in the lower reach of the bend. The island made by what was cut off by the first-mentioned chute was called Whisky Island, and another island, which was larger and farther south, and was bounded on the northwest by Whisky Chute and on the southwest by Bordeaux Chute, was called Bordeaux Island. Many years ago, about 1869, or a little, though not much, later, but exactly when was not satisfactorily proved by the evidence, the main channel of the river ceased to be around Walnut Bend. When this change first occurred, the new route of the main channel was through Bordeaux Chute. A result of the greater volume of the wa-

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ter of the river forcing its way through that chute was that the river overflowed the part of the peninsula which was east of that chute and washed away much of its surface. This process continued for several years, while the main channel was working its way farther south. Many years before the two suits mentioned were brought in 1914 the main channel of the river had shifted so far to the south that not only all of Whisky Island and the greater part of Bordeaux Island, but also five fractional sections of land which formerly constituted a part of the mainland of Tunica county, were north of the northern shore of the river; whereas, formerly both of the islands and all the land within the boundaries of the subdivisions mentioned were on the other side of the river. What the plaintiffs claim to be the owners of is a large part of this land, with the accretions thereto, which is now north of the river, much of which was covered by the river before it reached its present channel. It gradually emerged again as the channel shifted farther south; new deposits being made where the force of the current in the main channel had scoured off the surface. It was admitted that the plaintiffs have a chain of deeds straight from the United States to all of this land as originally surveyed by the United States government in the year 1836, or thereabouts, and shown by the maps and plats of said survey to have been included in the state of Mississippi.

From the averments of the bill it is to be inferred that the plaintiffs understood that the contested claims set up by the defendants included only land which had emerged between the shore line of the subdivisions owned by the plaintiffs as it existed before the channel of the river deserted Walnut Bend and went through Bordeaux Chute, and where the middle of the old channel was before that change occurred, and a long-time right to cut timber on the remainder of such new land. The answers of the defendants so delineated the boundaries of the land claimed by them as accretions to subdivisions of land in Arkansas which they owned as to make their claims cover, not only land which had emerged in the space covered by the water of the river when it went around Walnut Bend, but also land south of the old Mississippi shore line of the subdivisions patented to the plaintiffs' predecessors in title, which had been submerged by the river and emerged again as the channel shifted farther to the south.

[1, 2] It was urged in the argument made in behalf of the defendants that the action of the court in dismissing the bill is sustainable on the ground that it was not made to appear that the remedy at law available to the plaintiffs was inadequate. The terms of the decree make it apparent that the dismissal of the bill was due, not to a conclusion that the plaintiffs had failed to show that their remedy at law was inadequate, but to the conclusion that the land which was the subject of controversy in the suit was beyond the territorial jurisdiction of the court. Even if it was true, as contended by counsel for defendants, that the right which the plaintiffs asserted was the legal title to land shown to be in the possession of the defendants, and that what they sought was the possession and enjoyment of that land, this would not have justified the dismissal of the bill; as, if such was the nature of the suit, the

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proper decree to be rendered, pursuant to equity rule 22 (198 Fed. xxiv, 115 C. C. A. xxiv), was, not one dismissing the bill, but one ordering the transfer of the suit to the law side of the court, to be there proceeded with pursuant to the requirement of that rule. Corsicana National Bank v. Johnson, 218 Fed. 822, 134 C. C. A. 510. But the situation disclosed by the record indicates that the legal remedies available to the plaintiffs were inadequate. While the bill does not explicitly aver that the plaintiffs were, at the time the suits were brought, in actual possession of the land they claimed, it does show that they had the legal title to it, and had the right to possess and enjoy it. And there was evidence to support a finding that the plaintiffs had such possession of the land they claimed, which was uninclosed timbered river bottom land, as the character of the land made reasonably practicable. The bill averred and the evidence showed, not that the defendants were in possession of any of the land claimed by the plaintiffs, but that, under unfounded claims of ownership, they had trespassed upon and cut timber from it, and, unless enjoined, would continue to do so.

[3] In the opinion in the case of Holland v. Challen, 110 U. S. 15. 3 Sup. Ct. 495, 28 L. Ed. 52, in which it was held that a right given by a Nebraska statute to an owner of real property, whether in or out of possession, to maintain a suit against one claiming an adverse interest or estate in it, for the purpose of determining such estate and quieting the title, was enforceable in the United States court in favor of such an owner who was not in possession, it was said:

"No adequate relief to the owners of real property against the adverse claims of parties not in possession can be given by a court of law. If the holders of such claims do not seek to enforce them, the party in possession, or entitled to the possession—the actual owner of the fee—is helpless in the matter, unless he can resort to a court of equity."

Such an enlargement of equitable right resulting from a state statute may be enforced in a federal court of equity in favor of an owner of land not in possession, when the situation is such that the legal remedies available to such owner are inadequate or less efficient than the one he seeks by bill in equity. Devine v. Los Angeles, 202 U. S. 313, 26 Sup. Ct. 652, 50 L. Ed. 1046; Dick v. Foraker, 155 U. S. 404, 15 Sup. Ct. 124, 39 L. Ed. 201; Gormley v. Clark, 134 U. S. 338, 10 Sup. Ct. 554, 33 L. Ed. 909; New Jersey & N. C. L. & L. Co. v. Gardner-Lacy Lumber Co., 178 Fed. 772, 102 C. C. A. 220. Under Mississippi statutes the bill filed by the plaintiffs was maintainable in the state court in which it was brought, whether the plaintiffs were or were not in possession of the land they claimed. Code Miss. 1906, §§ 549-552. Upon its removal to the federal court, it was maintainable on the equity side of that court, unless, under the circumstances existing at the time the suit was brought, the plaintiffs had an adequate and equally efficient remedy at law. As the situation, as disclosed by the record, was such as to justify the conclusion that the legal remedies available to the plaintiffs were inadequate, we are not of opinion that it has been made to appear that the suit is one calling for an order transferring it to the law side of the court.

"It is the established rule that a riparian proprietor of land bounded by a stream, the banks of which are changed by the gradual and imperceptible pro-

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cess of accretion or erosion, continues to hold to the stream as his boundary; if his land is increased, he is not accountable for the gain, and if it is diminished, he has no recourse for the loss. But where a stream suddenly and perceptibly abandons its old channel, the title is not affected, and the boundary remains at the former line." Philadelphia Co. v. Stimson, 223 U. S. 605, 624, 32 Sup. Ct. 340, 346, 56 L. Ed. 570.

[4-6] The rules stated are equally applicable, whether the question of boundary is one betweeen private proprietors or between two states, the common boundary of which is a river. If the center of the channel is the boundary, however much its location may vary as the result of gradual and imperceptible accretion and erosion, it remains the boundary. But if the change is violent and visible, and arises from a known cause, other than gradual and imperceptible accretion and erosion, such as a cut through which a new channel is formed, the thread of the stream as it existed when such change occurred continues to be the boundary. State of Nebraska v. State of Iowa, 143 U. S. 359, 12 Sup. Ct. 396, 36 L. Ed. 186. In the case last cited it was decided that a change of the boundary between the states of Nebraska and Iowa did not result from an abrupt, visible change of the course of the Missouri river at a place where the river, having previously "pursued a course in the nature of an ox-bow, suddenly cut through the neck of the bow and made for itself a new channel." We think that it is made to appear by the evidence in the pending case that the disclosed change of the course of the Mississippi river, which resulted from its forcing for itself a new channel in another direction, was made in a manner quite similar to that of the change of the course of the Missouri river which was under consideration in the case just cited, and, as in that case, was without effect upon the boundary as it existed before the change occurred. While much of the evidence in the case is not clear and satisfactory, due largely to witnesses in their testimony making reference to objects the location of which is not disclosed by the record on appeal, we think that it sufficiently shows by a decided preponderance of it that the change of the river's main channel from the route around Walnut Bend to the route through Bordeaux Chute was due to a distinctly manifested diversion of a larger volume of water through that chute. In forcing for itself a new channel in a different direction, the action of the river was visible and violent. Rapid caving of the banks of what before was only a chute or bayou, and the carrying away by the stream of adjacent soil, with the timber on it, marked the deepening and widening of the new passageway. Cattle were carried off by the torrent, with the land upon which they happened to be. There was apparently credible testimony to support the conclusion that the change of the location of the main channel was so quickly effected that boats which kept in the channel in making regular runs up and down the river went around Walnut Bend going one way and followed the Bordeaux Chute route on the return trip. It was a case of the river so cutting out a new channel for itself that, after the change was effected, there was a considerable body of land on the side of the river other than the one it was on before. A result of such an adoption by the river of a new channel was that the center line of the old channel, which before was a boundary subject to

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change of location, became a fixed and unvarying boundary, unaffected by changes afterwards occurring in either the new channel or in the old bed of the river around Walnut Bend. The circumstance that, after the change of channel was effected, that old bed was still under water, did not prevent or delay the transformation of the former middle line of the channel around the bend from a shifting to a fixed boundary. That boundary was no longer subject to be affected by changes in the old river bed, or in its shore lines as they formerly existed.

It is to be inferred from the evidence that the emergence of land where the bed of the river formerly was around Walnut Bend occurred a considerable time after the river had made for itself a new main channel through Bordeaux Chute. Such filling up of that old river bed as occurred was by a gradual process; towheads, sandbars, and islands making their appearance above the surface of the water and gradually enlarging, while one or the other of the formerly existing shore lines encroached as the water receded from it, until space formerly occupied by the river was no longer under water. Whether it was or was not a fact that this new land so formed first made its appearance as additions to land on the Arkansas side of the boundary, the fact that the boundary had ceased to be a shifting one before the new land was added to the old prevented the change from having the effect of enlarging the state of Arkansas or of diminishing the area of the state of Mississippi, or of adding to or lessening what was included within the boundary lines of the subdivisions of land in the two states which were contiguous and had as a common boundary a line which formerly, but no longer, was a shifting one. Though it was by means of gradual and imperceptible accretions that new land was formed or built up from where the Arkansas shore line formerly was, until it extended beyond the boundary line of the two states, such a change in the surface conditions, in so far as it occurred after the boundary ceased to be a shifting one, was without effect on the title or ownership of the tracts the common boundary of which was fixed.

The claims asserted by the plaintiffs included no land on the Arkansas side of the center line of the old channel around Walnut Bend, as that line was located when the river made for itself a new channel through Misissippi land, part of which was patented by the United States to the plaintiffs' predecessors in title. Our conclusion is that the court was in error in declining to pass on questions duly raised by the pleadings and evidence in the case, on the ground that the land in dispute is not a part of the state of Mississippi.

Because of that error, the decree is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

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(245 Fed. 261)

O'NEIL, Insurance Com'r, et al. v. WELCH et al.

(Circuit Court of Appeals, Third Circuit. July 23, 1917. Rehearing Denied October 4, 1917.)

No. 2227.

1. COURTS ⟹259—FEDERAL COURTS—JURISDICTION.
The federal court in the exercise of its general equity jurisdiction has power to appoint a receiver on a stockholder's bill, determine a corporation's solvency, and distribute its assets, and no state statute can impair or destroy that power.

2. COURTS ⟹489(1)—FEDERAL COURTS—JURISDICTION.
Under Act Pa. June 1, 1911 (P. L. 599), declaring that whenever any domestic insurance company is insolvent, or is found after examination in such condition that its further transaction of business will be hazardous to its policy holders, or to its creditors or to the public, the Insurance Commissioner may through the Attorney General apply for an order directing such corporation to show cause why the Insurance Commissioner should not take possession of its property, conduct its business, and distribute its assets, the state courts have special jurisdiction to determine the solvency of an insurance company and distribute its assets, which jurisdiction is concurrent with that of the federal courts, to appoint a receiver on a stockholder's bill, determine such corporation's solvency, and distribute its assets.

3. COURTS ⟹493(1)—JURISDICTION—CONCURRENT JURISDICTION.
Where two courts have concurrent jurisdiction in the sense that each has the same jurisdiction, such jurisdiction should not be concurrently invoked and exercised, and that court which first obtains jurisdiction has the right to proceed to a final determination without the interference of the other.

4. COURTS ⟹497—JURISDICTION—TEST.
Control over the property in controversy is the test of jurisdiction.

5. COURTS ⟹500—JURISDICTION—CONCURRENT JURISDICTION.
Under Act Pa. June 1, 1911 (P. L. 599), providing that whenever any domestic insurance company is insolvent or is found to be in such condition that its further transaction of business will be hazardous to its policy holders, or its creditors, or the public, the Insurance Commissioner may through the Attorney General apply for an order directing such corporation to show cause why the insurance commissioner should not take possession of its property, conduct its business, and distribute its assets. The Insurance Commissioner by the Attorney General filed a suggestion in the state court and obtained a rule directing the insurance company to show cause why the commissioner should not take possession of its property and why the court should not order liquidation of its business and dissolution of the company. Prior to the hearing on the rule to show cause, but after it had been granted, a nonresident stockholder of the corporation filed a bill in the federal court praying dissolution of the corporation and distribution of its assets, and a receiver was appointed by the federal court. The receiver immediately took possession of corporate property in his reach. *Held* that, though the state court had not possession of the corporation's property, yet, as such remedy was open to it and was necessary to a determination of the proceeding therein instituted, the state court, though it had with the federal court concurrent jurisdiction, first obtained jurisdiction, which could not be ousted by the appointment of a receiver by the federal court; the rule that actual seizure of property is the test of jurisdiction not being applicable in view of the nature of the proceeding in the state court.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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6. CONSTITUTIONAL LAW ⟹129—IMPAIRMENT OF OBLIGATION OF CONTRACTS—CHARTER RIGHTS.

Notwithstanding Const. U. S. art. 1, § 10, inhibiting the states from enacting laws impairing the obligation of contracts, and Const. Pa. art. 1, § 7, an insurance company has no charter right in remedies prescribed for its dissolution, and the state may modify such remedies without violating the constitutional provisions.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; J. Whitaker Thompson, Judge.

Suit by Homer G. Welch and another against the Union Casualty Insurance Company, in which Samuel W. Cooper was appointed receiver. Petition of J. Denny O'Neil, Insurance Commissioner, and Francis Shunk Brown, Attorney General of the Commonwealth of Pennsylvania, was dismissed (238 Fed. 968), and petitioners appeal. Decree reversed.

Joseph L. Kun and William M. Hargest, Deputy Attys. Gen., and Francis Shunk Brown, Atty. Gen., for appellants.

Percival H. Granger and J. Howard Reber, both of Philadelphia, Pa., for appellees.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. This is an appeal from a decree of the District Court dismissing a petition of the Insurance Commissioner and Attorney General of the Commonwealth of Pennsylvania, asking the court to revoke its appointment of a receiver. The question is one of jurisdiction growing out of a conflict between State and Federal courts. As the facts are fully stated in the opinion of the District Court ([D. C.] 238 Fed. 968), only a brief outline is necessary to the present discussion.

The Union Casualty Insurance Company was a corporation of the Commonwealth of Pennsylvania. Under insurance laws in force at the time of its incorporation (Act of April 4, 1873, P. L. 20; Act of May 1, 1876, P. L. 53), the Insurance Commissioner of the Commonwealth had general supervision of insurance companies, with power to inquire concerning their solvency and management and to proceed against them when insolvent or fraudulently conducted. By the Act of June 1, 1911, the insurance laws of the Commonwealth of Pennsylvania were in part repealed and with new provisions were reenacted in a comprehensive system of State control, covering the examination, regulation, rehabilitation, liquidation and dissolution of insurance companies incorporated and doing business under the laws of that Commonwealth (Acts of June 1, 1911, P. L. 567, 581, 598, 599, 602, 604, 607). The Act of June 1, 1911 (P. L. 599) provides, among other things, a method of proceeding against insolvent and fraudulently conducted insurance companies, which, so far as it affects the question in issue, is as follows:

"That whenever any domestic insurance company, association, society, or order, including all corporations, associations, societies, and orders which are subject to examination by the Insurance Commissioner, or which are doing

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or attempting to do, or representing that they are doing, the business of insurance in this Commonwealth; * * * (a) is insolvent; * * * or (e) is found, after an examination, to be in such condition that its further transaction of business would be hazardous to its policy-holders, or to its creditors, or to the *public* * * * the Insurance Commissioner may, through the Attorney General, apply to the Court of Common Pleas of Dauphin County, or to the Court of any county in which the principal office of such corporation is located, for an order directing such corporation to show cause why the Insurance Commissioner should not take possession of its property and conduct its business, and for such other relief as the nature of the case and the interests of its policyholders, creditors, stockholders, or the *public* may require.

"Sec. 2. On such application, or at any time thereafter, such court may, in its discretion, issue an injunction restraining such corporation from the transaction of its business or disposition of its property until the further order of the court. On the return of such order to show cause, and after a full hearing, the court shall either deny the application or direct the Insurance Commissioner forthwith to take possession of the property and conduct the business of such corporation, and retain such possession and conduct such business until, on the application either of the Commissioner, through the Attorney General, or of such corporation, it shall, after a like hearing, appear to the court that the ground for such order directing the Insurance Commissioner to take possession has been removed, and that the corporation can properly resume possession of its property and the conduct of its business.

"Sec. 3. If, on a like application and order to show cause, and after a full hearing, the court shall order the liquidation of the business of such corporation, such liquidation shall be made by and under the direction of the Insurance Commissioner, who shall be vested by operation of law with title to all of the property, contracts, and rights of action of such corporation as of the date of the order so directing him to liquidate. * * *"

On November 15, 1916, the Insurance Commissioner of the Commonwealth of Pennsylvania, by the Attorney General, filed a suggestion in the Court of Common Pleas of Dauphin County (hereinafter called the State court), in conformity with the provisions of the quoted Act, and obtained a rule directed to The Union Casualty Insurance Company (hereinafter called the Insurance Company) "to show cause why the Insurance Commissioner should not take possession of its property, and to show cause why the Court should not order the liquidation of the business of the said company and the dissolution of the said corporation."

Pursuant to the provision of the Act, that *"On such application* * * * such court may * * * issue an injunction restraining such corporation from the transaction of its business or disposition of its property," that court, at the time it received the suggestion and granted the rule, ordered, that:

"Pending the further order of this court, the said Union Casualty Insurance Company of Philadelphia, Pa., its officers, agents and employees, *are hereby enjoined and restrained from* transacting any of the business of said company or *disposing of any of its property.*"

The rule was made returnable November 29, 1916. On that day the Insurance Company appeared and filed its answer to the suggestion, with a prayer that the rule be continued to December 19, 1916. The continuance was granted. On December 18, 1916, the day before the return day of the rule, Homer G. Welch, a citizen of New Jersey, and Consolidated Investment Company, a corporation of Delaware, filed a stockholders' bill in the District Court of the United States for the

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Eastern District of Pennsylvania (hereinafter called the Federal court), alleging solvency of the Insurance Company and praying the appointment of a receiver for the conservation of its property pending the adjustment of its difficulties. Although the Insurance Company had already appeared and answered in the proceeding in the State court, it voluntarily appeared in the Federal court and filed an answer concurrently with the bill, admitting its allegations; whereupon the Federal court appointed a receiver. The receiver immediately took possession of all assets of the Insurance Company within his reach, and served certified copies of his appointment upon the Attorney General of the Commonwealth of Pennsylvania and upon the judges of the State court.

The State court, on December 19, 1906, the return day of the rule to show cause, acting apparently in ignorance of the proceeding in the Federal court of the day before, proceeded with its hearing and entered an order directing the dissolution of the Insurance Company and the liquidation of its assets by the Insurance Commissioner in the manner prescribed by law, the decree being expressly based on the finding that the Insurance Company was insolvent and that its further transaction of business would be hazardous to its policyholders, its creditors *and the public*. On the next day, December 20, 1916, the Insurance Commissioner and the Attorney General, being then informed of the action of the Federal court, hastened to the Federal court and presented a petition praying that it revoke its appointment of a receiver. The Federal court granted a rule to show cause why its order of appointment should not be vacated, and upon its return, dismissed the petition and discharged the rule, in accordance with an opinion filed ([D. C.] 238 Fed. 968). This is an appeal from that decision.

The denial of the petition by the Federal court was based upon its understanding that its appointment of a receiver and his appropriation of the res prior to the decree of dissolution but subsequently to the institution of proceedings in the State court vested jurisdiction in the Federal court so fully and completely that neither law nor comity required its surrender to the State court. Judging from the consideration given by the learned District Judge to the general subject of conflict of jurisdiction between State and Federal courts, we infer that the broad subject, with its many phases, was as elaborately discussed before him as it was before us, raising many questions which we think are not in issue.

As we view the case, it does not present questions:—whether a Federal court has power to decree the dissolution of a corporation of the Commonwealth of Pennsylvania in a proceeding in which its jurisdiction first attached; whether a Federal court has authority to supersede and take away the general control over insurance companies vested by State statute in the Insurance Commissioner, before the Insurance Commissioner has in the exercise of his control begun proceedings in a State court; whether a Federal court has authority to supersede and annul action by a State court after proceedings there have been begun and jurisdiction has been acquired; or, generally, whether a state law can limit or impair the jurisdiction of a Federal court conferred by Act

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of Congress, or whether a Federal court, having first acquired jurisdiction, should in comity relinquish it to a State court in deference to state statutes. All these questions were in some measure considered in the decision and argued on appeal. As we view it, the case presents the single question: Which court first acquired jurisdiction? No other question is in issue and no other will be decided.

[1, 2] The starting point in this controversy, therefore, is the jurisdiction of the two courts. It cannot be doubted that the Federal court, in the exercise of its general equity jurisdiction, has power to appoint a receiver on a stockholder's bill, determine a corporation's solvency and distribute its assets, and that no State statute can impair or destroy that power. It is equally clear that the State court has power, in the exercise of its special jurisdiction, to determine on the Attorney General's suggestion the solvency of an insurance corporation, deliver its property to an officer with the function of a receiver, and distribute its assets; and that there is no Federal statute which impairs or destroys that power. Therefore, in considering the one question of priority of jurisdiction, we assume that the Federal and State courts named have concurrent jurisdiction in the appointment of receivers and in administering the affairs of insolvent corporations, though invoked and proceeded with in different ways.

[3] While the two courts have concurrent jurisdiction in the sense that each has the same jurisdiction, it is the policy of the law that the jurisdiction of both shall not be concurrently invoked and exercised; hence it is a well settled rule that as between two courts having concurrent jurisdiction of the subject of an action, the court which first obtains jurisdiction has the right to proceed to its final determination without interference from the other. Pitt v. Rodgers, 104 Fed. 387, 389, 43 C. C. A. 600. In our mixed system of State and Federal jurisprudence, such a rule is found not only desirable but necessary. It was therefore early held (Taylor v. Tainter, 16 Wall. 366, 21 L. Ed. 287), that:

> "Where a state court and a court of the United States may each take jurisdiction, the tribunal which first gets it holds it to the exclusion of the other until its duty is fully performed and the jurisdiction invoked is exhausted; and this rule applies alike in both civil and criminal cases. It is indeed a principle of universal jurisprudence that where jurisdiction has attached to a person or thing, it is (unless there is some provision to the contrary) exclusive in effect until it has wrought its function."

When, therefore, we find which court first obtained jurisdiction of this controversy, we have answered the question as to which should retain it.

[4, 5] Control over the property in controversy is the test of jurisdiction, Riggs v. Johnson County, 6 Wall. 166, 18 L. Ed. 768; In re Johnson, 167 U. S. 120, 17 Sup. Ct. 735, 42 L. Ed. 103. Upon this the parties agree. But at this point the parties and the authorities separate, following two lines, one to the effect that priority of judicial seizure, without regard to the previous pendency of a suit in another court, is the test of jurisdiction over the res, Powers v. Blue Grass B. & L. Asso. (C. C.) 86 Fed. 705; Knott v. Evening Post Co. (C. C.) 124 Fed. 342; 11 Cyc. 1010—Cases; and the other to the effect, that jurisdic-

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tion is acquired by the beginning of the proceeding and not by actual seizure of property in all cases where dominion and control of the property are essential to the full accomplishment of the action, Vowinckel v. Clark & Sons (C. C.) 162 Fed. 991; McKinney v. Landon, 209 Fed. 300, 305;[1] Mound City Co. v. Castleman, 187 Fed. 921, 110 C. C. A. 55; Texas v. Palmer, 158 Fed. 705, 85 C. C. A. 603, 22 L. R. A. (N. S.) 316; McDowell v. McCormick, 121 Fed. 61, 57 C. C. A. 401; Adams v. Mercantile Trust Co., 66 Fed. 617, 15 C. C. A. 1; Hirsch v. Independent Steel Co. (C. C.) 196 Fed. 104. An analysis of the cases discloses, that both these contentions are correct according to the subject matter to which they are applied and the thing intended to be done. The subject matter and object of an action therefore have as important a bearing upon the determination of the question whether jurisdiction is acquired by the beginning of the suit or by the appointment of a receiver and his seizure of property, as have the acts of the court in reducing property to its control.

If the action in the State court had been brought as in the Federal court on stockholders' or creditors' bill, the jurisdiction invoked in both courts being in behalf of parties with like rights over the same subject matter, the race for jurisdiction would have fallen within and would have been determined by the line of authorities which hold that the court which first obtained control of the property through seizure by its appointed receiver, first acquires jurisdiction without regard to which first commenced proceedings. Cases supra. When, however, from the character of the parties and the very nature of the two proceedings, different rights are asserted and different remedies are pursued, though the essential issues and subject matter are the same, the question when jurisdiction is acquired is likely to be determined by considerations other than the court's actual possession of the property in controversy. These considerations have received attention by courts in similar cases where an action in a State court was begun first, and a receiver was first appointed by a Federal court. In McKinney v. Landon, 209 Fed. 300, 126 C. C. A. 226, the court said:

"It is a maxim of the law that a court having possession of property cannot be deprived thereof until its jurisdiction is surrendered or exhausted, and that no other court has a right to interfere. It is a principle of right and of law which leaves nothing to the discretion of another court and may not be varied to suit the convenience of litigants. Merritt v. American Steel Barge Co., 24 C. C. A. 530, 79 Fed. 228. It is essential to the dignity and authority of every judicial tribunal and is especially valuable for the prevention of unseemly conflicts between federal courts and the courts of the states. As between them it is reciprocally operative—mutually protective and prohibitive. The most difficulty arises in determining when possession of property has been taken, when jurisdiction has attached to the exclusion or postponement of that of other courts. It is settled, however, that actual seizure or possession is not essential, but that jurisdiction may be acquired by acts which, according to established procedure, stand for dominion and in effect subject the property to judicial control. It may be by the mere commencement of an action the object, or one of the objects, of which is to control, affect, or direct its disposition. See Mound City Co. v. Castleman, 110 C. C. A. 55, 187 Fed. 921, and the cases cited. The principle often applies 'where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in suits of a similar nature where, in the progress of the litigation, the court may be compelled to assume the possession and control

[1] 126 C. C. A. 226.

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of the property to be affected.' Farmers' Loan & Trust Co. v. Railroad, 177 U. S. 51, 20 Sup. Ct. 564, 44 L. Ed. 667. The mere fact that an exigency calling for a receiver may arise does not make the jurisdiction of the court in that respect relate to the beginning of the action (Shields v. Coleman, 157 U. S. 168, 178, 15 Sup. Ct. 570, 39 L. Ed. 660), as perhaps where it is an ordinary aid to execution on a final judgment and dependent upon conditions or circumstances that may or may not occur. But where the declared purpose of an action in whole or in part is directed to specific property, and the full accomplishment thereof may require judicial dominion and control, jurisdiction of the property attaches at the beginning of the action. And it is so if dominion and control are essential to the action, though not yet exercised."

Applying these observations to the case in hand, it is to be noted that the action in the Federal court was brought under the general jurisdiction of that court and was of a character indicated by the stockholders' bill upon which it was instituted. The action in the State court was brought against a creature of the State by a State official to enforce the State's rights in a court vested by State statute with special jurisdiction to try and determine those rights. We must therefore inquire with some care into the subject matter of the State action before we can determine when the State court acquired jurisdiction and whether it was deprived of it by the subsequent action of another court.

The Commonwealth of Pennsylvania has prescribed by law a comprehensive system of rules governing the incorporation and operation of insurance companies within its borders. It has undertaken, as a State function, their examination, regulation, and, when necessary, their dissolution. In assuming this function the State has defined rights conferred upon insurance companies and rights reserved to itself, imposed duties and prescribed remedies. In conferring upon insurance companies incorporated under its laws the right to solicit business from the public, it imposed upon them the duty to be solvent and to conduct their business honestly, and reserved to itself the right to inquire both as to their solvency and business conduct, and when necessary to stay their business and end their existence.

The state engaged in this undertaking primarily for the protection of the public. Being for the public, its action is a governmental function. When in its exercise it becomes necessary to protect the public from insolvent or improperly conducted insurance companies, the state pursues a remedy prescribed by the same law that conferred the corporation's rights and defined the state's duties. Given briefly, the Insurance Commissioner, acting through the Attorney General, files in a State court a suggestion of the corporation's insolvency or unlawful conduct. In this way the State acts and in this way the State begins suit. Upon the State's suggestion the court starts a judicial inquiry by directing to the Insurance Company a rule to show cause why the Insurance Commissioner should not take possession of its property, *and at the same time* (that is at the very beginning of the suit) the court, if it wishes, lays its hand upon the company's property, and by a restraining order holds it within its control pending the inquiry.

The jurisdiction of the State court thus invoked is a special jurisdiction conferred by statute as a part of the State's policy of insurance regulation and control. It is not conferred for the protection of cor-

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porations' policyholders and creditors alone, but for the protection of the public as well. This clearly appears by the terms of the act; it again appears in the court's decree. In prosecuting an insurance company the State is acting for the public, and the public is in turn interested in the proceeding; though not nominally present as a party, it is nevertheless present in the person of the Attorney General.

The statutory proceeding includes several prescribed steps, namely, the filing of the suggestion, the rule to show cause (and if needed, an accompanying order restraining the disposition of the corporation's property), hearing on the rule, a decree dismissing the proceeding or directing the Insurance Commissioner to take over the property and conduct the business of the corporation and proceed with the liquidation and distribution of its assets. In this order, actual or physical possession of the property of the corporation is not acquired until the rule has been returned and made absolute. Yet it is absolutely essential to the declared purpose of the action that the property of the corporation, its subject matter, shall not be withdrawn from the jurisdiction of the court before its inquiry is completed. To that end the statute affords, as against the corporation and its officers, the remedy of injunction, to be invoked, if desired, at the inception of the proceeding. As against stockholders, the law is equally effective. The law under which an insurance company is incorporated subjects it to State supervision and administrative control, and ordains the proceeding by which its life may be determined and its affairs wound up and liquidated. The rights of such a corporation are therefore subordinate to the rights of the State, and the rights of stockholders are no greater than those of the corporation. When, therefore, the statutory proceeding has been begun in a State court and by its commencement jurisdiction has been acquired over the corporation, neither the corporation nor its stockholders, nor its creditors can divest the court of its jurisdiction or deprive the State of its public function by subsequently invoking the aid of a Federal court to remove the corporation's property beyond the reach of the State court and thereby withdraw from the State court the subject matter of the action there pending. If this were not so, every action instituted by the state government against an insurance company might be interrupted and defeated by a non-resident stockholder filing in a Federal court a bill accompanied with the answer of an acquiescing corporation, after action has been begun in the State court and before in its orderly progress the property of the corporation has been physically seized. Thus the policy of the State would be thwarted and its administration overthrown; the State's creature would be more powerful than the State itself. We are satisfied that no such thing was contemplated either in Federal or State polity.

In disposing of this question it is important to note that we are not concerned with a situation where a Federal court on a stockholders' bill appointed a receiver, and, acquiring control of the corporation's property, acquired jurisdiction before the State moved in the State court, Lyon v. McKeefrey, 171 Fed. 384, 96 C. C. A. 340; we are dealing with a situation where the State moved first, where the State court first acquired jurisdiction over the corporation by its appearance

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and answer, and exercised a species of control over its property by a restraining order long before a bill was filed in the Federal court and long before a receiver was appointed by that court, and where in one day more it would have completed its control over the corporation's property by actual seizure but for the appointment of a receiver by the Federal court, made possible only by the willing answer of the corporation filed concurrently with the bill.

The act of the State in bringing suit was the exercise of a governmental power; the acts of the State court in pursuing a procedure established to insure the full accomplishment of that power stand for dominion over the entire subject matter in litigation, and subject the property of the corporation to its jurisdiction for the full purpose of the judicial proceeding, which includes its possession, liquidation and distribution. We are therefore of opinion that the State court acquired jurisdiction not only of the corporation but of its property upon the inception of the proceeding, and, being first to acquire jurisdiction, is entitled to retain it until the State has wrought its function and until the jurisdiction invoked has been exhausted.

[6] The appellees attack the decree of the State court, entered in pursuance of the Act of June 1, 1911, P. L. 599, upon the ground that in enforcing the remedies of that Act against the defendant corporation created prior thereto, charter rights are impaired and burdens are imposed in violation of article 1, section 10 of the Constitution of the United States, and article 1, section 7 of the Constitution of Pennsylvania. In disposing of this contention, it is sufficient to say, that the particular rights asserted as charter rights acquired by the corporation under laws in force at the date of its creation, were rights in the remedies thereby prescribed to be employed against it; and the particular burdens complained of as being imposed by laws subsequently enacted, are the new and different remedies to which the corporation was subjected. The point of the complaint therefore is as to remedies lost and imposed. In these we find no charter rights assailed. Nor do we find burdens imposed, other than such as the Commonwealth may constitutionally impose and to which the corporation must submit.

The decree below is reversed.

(245 Fed. 269)

JONES v. PETTINGILL et al.

(Circuit Court of Appeals, First Circuit. July 16, 1917.)

No. 1173.

1. PARTNERSHIP ⟹203—ACTIONS BY FIRM—DEATH OF PARTNER—EFFECT.

Under Rev. St. § 955 (Comp. St. 1916, § 1592), providing that, when either party dies before final judgment, the executor or administrator may, if the cause of action survives, prosecute or defend the suit, and section 956 (Comp. St. 1916, § 1593), providing that, if there are two or more plaintiffs or defendants in a suit where the cause of action survives to the surviving plaintiff or against the surviving defendant, the action shall proceed at the suit of the surviving plaintiff against the surviving defendant,

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where a contract sued on was made with the two plaintiffs as partners, and any interest acquired by one dying before judgment survived to the other, the suit was properly permitted to proceed in the survivor's name as surviving plaintiff, without the deceased party's executor or administrator becoming a party.

2. CHAMPERTY AND MAINTENANCE ⟹5(7)—RAISING OBJECTIONS.

Where a contract, challenged as contrary to good morals, champertous, and void, is such a contract as a court of equity should not enforce, the objections on this ground might be considered by the District Court of its own motion, whether suggested by the parties or not.

3. APPEAL AND ERROR ⟹173(6)—REVIEW—QUESTIONS NOT RAISED BELOW.

An appellate court may consider such objections of its own motion, whether raised below or not.

4. COURTS ⟹405(17)—CIRCUIT COURT OF APPEALS—ASSIGNMENT OF ERRORS—NECESSITY.

Under the express provisions of rule 11, and of rule 24, par. 4 (150 Fed. xxvii, xxxiii, 79 C. C. A. xxvii, xxxiii) of the Rules for the First Circuit, the court may, at its option, notice plain errors, though not assigned.

5. CHAMPERTY AND MAINTENANCE ⟹5(3)—AGREEMENTS WITH ATTORNEYS.

A contract between an attorney and client for contingent compensation for professional services, whereby the attorney is to pay the entire expense of litigation, control its settlement, and be jointly and equally interested with the client in the property involved, when recovered, is so far contrary to the policy of the law that a court of equity will not enforce it.

6. CONTRACTS ⟹129(1)—PUBLIC POLICY—AGREEMENT AS TO SETTLEMENT OF SUIT.

A stipulation in such an agreement by attorneys for a contingent fee, purporting to invalidate any settlement of the attempted litigation by the client, unless made in the attorneys' presence and with their consent, is against public policy and void.

7. CHAMPERTY AND MAINTENANCE ⟹5(6)—AGREEMENTS WITH ATTORNEYS.

A contract between an attorney and client for contingent compensation, whereby the attorney is to pay the entire expense of litigation, control its settlement, and be jointly and equally interested with the client in the property recovered, is obnoxious to the policy of the law of Porto Rico, in view of Civ. Code 1902, § 1362, prohibiting officials of justice from acquiring the property and rights in litigation, and including in this prohibition lawyers with regard to the property and rights which may be the object of the litigation in which they take part.

8. CHAMPERTY AND MAINTENANCE ⟹5(3)—AGREEMENTS WITH ATTORNEYS.

A bill founded directly upon such agreement, and seeking to establish alleged rights under it, cannot be maintained in a court of equity, though not brought against the client, but against a purchaser of her interest in the property recovered.

9. APPEAL AND ERROR ⟹162(1)—WAIVER OF RIGHT TO APPEAL—ACCEPTANCE OF BENEFITS.

Decrees adjudged that plaintiff owned an undivided interest in a plantation, and was entitled to redeem such interest from defendant upon payment to him of a specified amount, and decreed that plaintiff pay defendant such amount, and that the receipt taken therefor be lodged in the registry of the court. Three days after entry of the decree there was filed an acknowledgment, signed by defendant, that he had received the amount ordered paid. The following day defendant petitioned for reconsideration of the decrees, and after denial of his petition he appealed, so conditioning his appeal bond as to make it operate as a supersedeas. It appeared that he mistakenly supposed himself under the necessity of receiving the money and filing the receipt. *Held*, that there was no such unmistakable acquiescence on defendant's part in the decrees appealed from, or acceptance of benefits thereby, as deprived him of his right to appeal; the receipt not hav-

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ing been understood and intended as such acquiescence, and the court still having the power to restore both parties to their rights by directing proper repayment.

10. JUDGMENT ⟹649—CONCLUSIVENESS—NATURE OF JUDGMENT.

In a suit to recover plaintiff's share of a plantation, which her father, O., was occupying at the time of his death under a lease and obligation of purchase and sale between him and A., the court entered an order reciting that A. desired only payment of whatever might be found due him, and to hold a lien until such payment should be made, and that so to treat the claim would eliminate considerable controversy, and directed that the property be considered as belonging to O.'s succession, subject to A.'s mortgage for such amount as might be found due by the court and thereafter paid A. by the receiver then in charge. *Held*, that it was not apparent how the court, even with the consent of the parties, could thus transform A.'s claim into a conveyance to O.'s heirs with a mortgage back from the heirs, but, in any event, the order embodied only a proposed compromise agreement, never carried out, and wholly ineffective to change the nature of O.'s interest in the plantation; the court never having determined the amount due under the so-called mortgage, and no steps towards such determination having ever been taken.

Appeal from the District Court of the United States for the District of Porto Rico; Peter J. Hamilton, Judge.

Suit by N. B. K. Pettingill and others against Walter McK. Jones. From a decree in favor of complainants, defendant appeals. Reversed and remanded, with directions.

Francis E. Neagle, of New York City, and Woodward Emery, of Boston, Mass. (Martin Gilbert, of Boston, Mass., on the brief), for appellant,

N. B. K. Pettingill, of Tampa, Fla., for appellees.

Before DODGE and BINGHAM, Circuit Judges, and MORTON, District Judge.

DODGE, Circuit Judge. The rights asserted by the appellees, plaintiffs in the District Court, are based upon a contract in writing, made at Ponce, March 20, 1905, between them and Adelaida Olivieri. Her agreements were as follows:

"I agree to pay to Messrs. Pettingill and Leake, my lawyers, the half of what I may receive if the judgment of the court is favorable in a suit which I am going to bring in the Federal Court against Antonio Olivieri, executor of Felix Olivieri, if said lawyers pay all the costs and expenses of said suit, and carry it to a conclusion. In case of settlement the lawyers shall receive the half of whatever sum is paid to me in settlement of their fees. In accordance with the judgment of the court, I will pay to them and divide with them in proportion of one-half of whatever I may receive by order of the court."

Their agreements were as follows:

"We agree to bring this suit in favor of [said Adelaida], paying all costs and expenses, and carrying it to a conclusion, either by settlement or judgment of the court."

The final clause of the contract, to which both the parties subscribed, was as follows:

"Moreover it is agreed that, in case of settlement by agreement, such settlement shall not be valid, if not made in the presence and with the consent and assistance of the two parties to this contract."

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Felix Olivieri, referred to in the agreement, was Adelaida Olivieri's father. The contemplated suit against his executor was brought and carried to a conclusion by Pettingill and Leake, in accordance with the agreement. In it she claimed one-ninth of his real estate as his heir; also a legacy of $5,000 given her, and charged upon his real estate, by his will. The final judgment of the court, rendered May 18, 1910, was in her favor. She was adjudged to be owner of one-ninth of her father's interest in a coffee plantation called Limon, and entitled also to a charge upon the whole of his said interest in the sum of $5,000.

The above litigation, carried on in the Federal District Court for Porto Rico, involved the appointment of a receiver, who took custody of the Olivieri estate, including so much of the Limon property as is here in controversy. This, although Olivieri did not own it, he was occupying at the time of his death under a "lease and obligation of purchase and sale," made between him and certain Alvarados, its owners, October 24, 1900, to expire July 31, 1908. As is further stated below, there was an attempt during said litigation to deal with this as if it had in fact belonged to the Olivieri estate subject to a mortgage in favor of the Alvarados.

Pending said litigation, and while said property was in the receiver's custody, Jones acquired from the Alvarados all their rights in it. Later, after the above final decision, he also bought from Adelaida Olivieri all her interest in it and in the legacy charged upon her father's estate in her favor, according to said decision. In these acquisitions one A. B. Marvin was associated with him, but Marvin need not be further referred to; Jones having since become sole owner of whatever they both so acquired.

The present suit was brought by the plaintiffs in the Federal District Court for Porto Rico, July 16, 1910. Adelaida Olivieri, her husband, Jones, and Marvin were made defendants. We are now concerned only with the relief sought against Jones. Alleging that the rights in Limon acquired by him as above from Adelaida Olivieri had been acquired with notice of their above contract with her, they asked that he be enjoined from transferring what he had so acquired; that they be decreed to be "the equitable owners of an undivided half interest in and to" said $5,000 charge upon Limon; that "the attempted cession and assignment thereof" by her to Jones be declared "fraudulent and void" as against them; that they be decreed entitled to a cession of Jones' rights acquired from the Alvarados, as above, upon the same terms upon which Jones acquired them, or upon payment of the amount legally due thereon; that Jones be ordered to make such cession upon payment tendered; and for specific performance of their above contract with Adelaida Olivieri.

[1] The plaintiff Leake died in April, 1912, after the present bill had been filed, but before the entry of any decree in the suit. No executor or administrator has become party in his place, according to Rev. St. § 955 (Comp. St. 1916, § 1592), and Jones has contended that all the proceedings since Leake's death are void, because the suit has not been so revived, nor carried on by the surviving plaintiff, in pursuance of Rev. St. § 956 (Comp. St. 1916, § 1593). But we think it sufficiently

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clear that the contract was with the two plaintiffs as partners, that any interest acquired therein by Leake would have survived to Pettingill, and that the record shows the suit to have proceeded since Leake's death in Pettingill's name as surviving plaintiff. In the District Court's rulings regarding this question, assuming that Pettingill and Leake acquired any interest in the property in dispute by virtue of their contract, we find no error.

The District Court, on March 21, 1914, decreed that Pettingill was "entitled to relief under the bill"; that he had acquired and then owned an undivided half interest, equally with Jones, in so much of Limon as Adelaida had conveyed to Jones, as above, both their interests having been acquired "by purchase from Adelaida Olivieri"; also that he was entitled to redeem from Jones one-half of one-ninth of her father's interest in Limon, upon payment to Jones of a proper proportion of "the sum found to be due by" Olivieri's heirs "upon the Alvarado mortgage," crediting against such sum the net proceeds of the property while held by Jones, less the value of Jones' improvements. Reference to a master was ordered, to ascertain the amount so to be paid Jones for the purpose of such "redemption."

The master having reported said amount to be $1,464.75, the District Court, on March 1, 1915, confirmed his report, and further decreed that Pettingill pay Jones said amount, the receipt taken therefor to be lodged in the registry of the court.

From these decrees, both entitled "Final Decree," after a motion for reconsideration thereof had been denied May 29, 1915, Jones appealed to this court on July 8, 1915.

The principal question raised before us was not raised by the answer to the bill, nor at any time during the proceedings in the District Court, until Jones alleged in his petition for reconsideration, above mentioned, as ground for reconsideration, that the District Court had erred in not holding the contract sued on "contrary to good morals, champertous, and void," and therefore a contract upon which no recovery could be had. In denying the petition the District Court held, as appears from its opinion dated May 29, 1915, that Jones could not attack the validity of the contract for the first time after final decree, nor at any time "when not a party to the contract"; and discussion of its validity was regarded as unnecessary. It also held Jones estopped in any case from raising the question, by acceptance from Pettingill of the amount required for "redemption" of the interest claimed by him, as determined by the master.

[2-4] The above objections to the validity of the contract raise a question of public policy, apparent from the record and involving no disputed questions of fact. The contract is annexed in full to the bill, both in Spanish and in English. If it appears from the record to be such a contract as a court of equity should not lend its aid to enforce, the above objections go to the foundation of the rights asserted in the bill, and are objections such as the District Court might have considered of its own motion, whether suggested by the parties or not, and such as might have been urged in arrest of judgment. They are also such objections as an appellate court may consider of its own motion,

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whether raised below or not. Primeau v. Granfield, 193 Fed. 211, 114 C. C. A. 549; Griggs v. Nadeau, 221 Fed. 361, 363, 137 C. C. A. 189. It is said that they are not properly raised by the assignments of error; but this court may, under its rules 11 and 24, paragraph 4 (150 Fed. xxvii, xxxiii, 79 C. C. A. xxvii, xxxiii), notice at its option plain errors not assigned, and has repeatedly done so.

[5] That this is a contract which "would have been regarded as champertous and void under the old common law" is conceded; but it is said that there is no jurisdiction wherein the common-law rule has not been changed to a large degree, the extent of change varying in different jurisdictions. We shall assume, in view of Stanton v. Embrey, 93 U. S. 548, 23 L. Ed. 983, McPherson v. Cox, 96 U. S. 404, 24 L. Ed. 746, Taylor v. Bemiss, 110 U. S. 42, 3 Sup. Ct. 441, 28 L. Ed. 64, Ball v. Halsell, 161 U. S. 72, 80, 16 Sup. Ct. 554, 40 L. Ed. 622, and Nutt v. Knut, 200 U. S. 15, 21, 26 Sup. Ct. 216, 50 L. Ed. 348, that the contract is not to be held either void or voidable, merely because the attorneys' compensation is made contingent upon success or amount of recovery; it having been free, so far as appears, from fraud, misrepresentation, or unfairness. The above decisions relate to contracts for services in prosecuting claims against the United States or before tribunals acting under the authority of the federal government.

But the agreement that the attorneys shall have a contingent fee of 50 per cent. is by no means the most objectionable feature of this contract. They undertake in it to pay all the costs and expenses of the contemplated suit, and it provides that no settlement by their clients shall be valid, unless they are present and consent. Further, although there is no assignment by her to them, in express terms, of part of her interest, she is made to agree with them, who do not claim to have had any interest of their own in the property, "to pay to and divide with them in proportion of one-half of whatever I may receive by order of the court." The construction of this agreement which they assert in paragraph II of their bill is that they—

"should have and be entitled to a one-half interest in whatever property or other assets of said estate they might succeed in recovering for [her]."

Paragraph V of their bill further alleges that:

"Upon the entry of the final decree [they] became entitled under and by virtue of the contract aforesaid to an equitable undivided one-half interest in and to said lien upon said plantation Limon, and whatever amount might be ultimately found to be due thereon, and in and to the said undivided one-ninth interest adjudged to [her] in the general assets of the estate."

And this was the construction adopted by the District Court, as appears by its decree March 21, 1914, the substance whereof has been already stated. In an opinion dated March 9, 1914, directing the entry of said decree, after holding that Jones had bought in subordination to the plaintiff's claim under said contract, it is said that Adelaida Olivieri could under the circumstances—

"sell her interest in the property, but could sell no more than her interest. She had already vested [the plaintiffs] with a half interest, and could pass only the other half interest to Jones. * * * It follows that [the plaintiffs] are cotenants of this property."

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It may be that there are jurisdictions in which the local legislation would afford ground for upholding some even of the above provisions; but, generally speaking, we think it clear that a contract between attorney and client, for contingent compensation for professional services, whereby the attorney is to pay the entire expense of litigation, to control its settlement, and to be jointly and equally interested with the client in the property involved when recovered, is a contract so far contrary to the policy of our law that a court of equity will not enforce it.

In Gregerson v. Imlay, 4 Blatchf. 503, Fed. Cas. No. 5,795, Judge Blatchford refused to enjoin one party to a contract having similar features (though not between attorney and client) from breaking it, and declared that, even if the contract might be barely valid at law, a court of equity should lend no countenance to it, because tainted with champerty and maintenance.

In McPherson v. Cox, 96 U. S. 404, 24 L. Ed. 746, the agreement between attorney and client had been for a fixed sum, contingent upon success, to be paid out of the proceeds of land in litigation. An objection that the agreement was champertous was held sufficiently answered by the fact that the attorneys—

"did not agree to pay any of the costs, they did not agree to take any part of the land, which was the subject of the suit, for their compensation, nor did they agree to take anything but money." 96 U. S. 416.

In Peck v. Heurich, 167 U. S. 624, 17 Sup. Ct. 927, 42 L. Ed. 302, a deed in trust was held void for champerty, because, after providing that the trustee should sue for, take possession of, and sell the granted land, it further provided that one trustee, an attorney, should retain out of the proceeds one-third, after paying out of said one-third all the trustees' costs and expenditures. It was the agreement by the attorney to take as his compensation a part of the thing in dispute, and to prosecute the litigation at his own expense, which was regarded as making the deed embodying it contrary to public policy, and therefore void. The court concurred in the condemnation of such agreements expressed by the Court of Appeals for the District of Columbia in Johnson v. Van Wyck, 4 App. D. C. 294.

In Casserleigh v. Wood, 119 Fed. 308, 56 C. C. A. 212, the Court of Appeals for the Eighth Circuit, relying on the last-cited decision, affirmed a refusal to order specific performance of a contract to prosecute litigation for a contingent fee payable in kind out of what should be recovered, and also to pay all costs of the litigation. It was said that, even if an action at law would lie upon such a contract, it was so far tainted with illegality that a court of equity ought not to enforce it.

[6] As to the stipulation purporting to invalidate any settlement of the contemplated litigation by the client, unless made in the attorneys' presence and with their consent, we can have no hesitation in regarding it as against public policy and void for that reason. The District Court for Porto Rico so regarded a stipulation to the same effect, in a contract similar in many respects to this, in Rodriguez v. Cueli, 1 Porto Rico Fed. 272, 275. In re Snyder, 190 N. Y. 66, 82 N. E. 742, 14 L. R. A. (N. S.) 1101, 123 Am. St. Rep. 533, 13 Ann. Cas. 441, and Wel-

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ler v. Jersey City, 68 N. J. Eq. 659, 61 Atl. 459, 66 Ann. Cas. 442, may also be referred to.

[7] While the local law here involved—i. e., the law of Porto Rico—deals with the above questions from a somewhat different point of view, and its policy is to be gathered more from Codes based on the civil law, or from commentators thereon, than from reported decisions, we find no reason to believe that contracts like that here in question are regarded in Porto Rico as any less obnoxious to the policy of the law than they are in the United States. The well-recognized grounds for believing danger to the public interest to be inherent in them, can be no less strong there than here.

By section 1362 of the Porto Rican Civil Code of 1902, which took the place of an earlier Code containing like provisions, judges, public prosecutors, clerks of courts, "and officials of justice" are made incapable of acquiring by purchase the property and rights in litigation before the court in which they exercise their respective duties; including in this prohibition acquisition by assignment. The same prohibition expressly includes—

"the lawyers, with regard to the property and rights, which may be the object of the litigation, in which they may take part by virtue of their profession and office."

The Spanish Civil Code contains similar prohibitions, and the Spanish authors agree that under Spanish law an agreement by an attorney to prosecute litigation for an interest in the property involved is forbidden, and therefore void.

[8] It is said that the above objections can at most render the contract voidable by Adelaida Olivieri, and that they cannot avail Jones. But if, as we hold, they render it incapable of enforcement in a court of equity, whatever validity might be conceded to it in a suit at law against her, the present bill, which is founded directly upon it and seeks to establish alleged rights under it, cannot be maintained. Burnes v. Scott, 117 U. S. 582, 6 Sup. Ct. 865, 29 L. Ed. 991; Peck v. Heurich, 167 U. S. 624, 17 Sup. Ct. 927, 42 L. Ed. 302, above cited.

[9] A motion to dismiss this appeal, because not taken in time, has not been insisted on; but Jones' acceptance of the amount ordered to be paid him by the decree entered March 1, 1915, is relied on as estopping him from claiming or maintaining it; and, as has been stated, this was the view taken by the District Court.

Three days after said decree was entered—i. e., on March 4, 1915—there was filed in court an acknowledgment in writing, signed by Jones, that he had received from Pettingill $1,464.55, "being in full compliance with the order of this court, upon the final decree herein, made upon March 1, 1915, in which said complainants were directed to pay me said sum." As has appeared, the decree required such receipt to be filed in the registry. On April 5th Jones' petition for reconsideration was filed, on May 1st, it was answered, and on May 29th the court denied it. Except so far as indicated by what appears as above from the record there is nothing to show acquiescence by Jones in the provisions of the decree. He does not appear to have otherwise acknowledged satisfaction thereof by Pettingill, nor to have taken any

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other step indicating acquiescence. That the above receipt was not understood or intended by him as constituting such acquiescence is indicated by his subsequent application for rehearing and appeal. His appeal bond is so conditioned as to make it operate as a supersedeas. From the opinion filed by the District Judge in denying a rehearing, it appears that Jones mistakenly supposed himself under the necessity of receiving the money and filing the receipt therefor.

Believing, as we do, that the District Court ought not to have entertained the bill, we do not think that such unmistakable acquiescence on his part in the decrees appealed from appears, or acceptance of benefits thereby, as must involve the loss of his rights as appellant. The right to appeal is a right not to be held waived, except upon clear and decisive grounds. The District Court, which holds his receipt, can, upon reversal, restore both parties to their rights as they stood before said payment was made, by directing proper repayment to Pettingill. Erwin v. Lowry, 7 How. 172, 184, 12 L. Ed. 655.

[10] The view of the case which we take renders it unnecessary to consider at length a question to which much of the argument has been devoted, viz. whether or not the District Court erred in treating that part of the Limon property not owned by Felix Olivieri at the time of his death, and afterward acquired by Jones from its owners, as in fact belonging to Olivieri's heirs, subject to a mortgage in favor of Jones' grantors, the Alvarados, so that Jones could take from them only a mortgagee's interest, subject to a right of redemption in the Olivieri heirs.

The District Court held that an order entered by it on June 7, 1907, in the litigation to recover Adelaida's share of the Olivieri estate, to which the Alvarados became parties, had so adjudged; that this order had become final as to all the then parties in interest, and had established the above situation as res judicata for the purposes of the present case. It is upon this holding that the provisions of the decrees appealed from regarding redemption are based.

Said order of June 7, 1907, after reciting that the Alvarados desired only payment of whatever might be found due them from Olivieri's estate, and to hold their lien upon the premises leased to Olivieri until such payment should be made, and that so to treat their claim would eliminate considerable controversy as to the construction of the instrument dated October 24, 1900, under which Olivieri held the property, directed that said property be considered as belonging to the Olivieri succession subject to the mortgage of said Alvarados, for such amount as might be found due by the court and thereafter paid said Alvarados by the receiver then in charge.

We fail to understand how the court could in any event have had any power, even upon the consent by all parties then before it, which does not appear, thus to transform the Alvarado claim under their agreement with Olivieri, whatever its nature, into a conveyance by them to Olivieri's heirs, with a mortgage back from said heirs to them.

But it is enough to say that said order clearly appears to have embodied only a proposed compromise agreement never carried out. The court never determined under it any amount to be due under said

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"mortgage," nor were any steps toward such determination ever taken. Jones' contention in the present suit that such order was wholly ineffective in the present suit, so far as he was concerned, ought, in our opinion, to have been sustained. In so far as the decrees appealed from are based upon the existence of the supposed "mortgage," or any alleged right in Pettingill to redeem from it what Jones bought from said Alvarados, we hold them erroneous. It follows that the above payment to Jones ought not to have been ordered or made.

The decrees appealed from are reversed, and the case is remanded to the District Court, with directions to dismiss the bill as to the appellant, Jones, upon payment by him of the amount for which his receipt on file therein is given, with interest, either to said Pettingill or into court for him; and said appellant recovers his costs of appeal.

(245 Fed. 278)

SIMPSON v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. August 6, 1917. Rehearing Denied October 1, 1917.)

No. 2943.

1. PROSTITUTION ⚷1—WHITE SLAVE ACT—APPLICABILITY.

Under White Slave Act June 25, 1910, c. 395, § 3, 36 Stat. 825 (Comp. St. 1916, § 8814), providing that any person who shall induce "any woman or girl to go from one place to another in interstate or foreign commerce * * * for the purpose of prostitution or debauchery or for any other immoral purpose, or with the intent and purpose on the part of such persons that such woman or girl shall engage in the practice of prostitution or debauchery or any other immoral practice," shall be punished as therein directed, defendant, who induced a woman to travel from California to Mexico to manage a house of prostitution, was guilty; the act not being limited to the personal immorality of the woman induced to travel in interstate commerce.

2. INDICTMENT AND INFORMATION ⚷110(3)—WHITE SLAVE ACT—SUFFICIENCY.

An indictment in the language of the statute, charging that the defendant unlawfully induced a named woman to travel in interstate commerce from California to Mexico for the purpose of managing a house of prostitution and conducting a place where persons of the opposite sexes meet and have illicit intercourse, is sufficient.

3. COURTS ⚷374—CRIMINAL PROSECUTIONS—INDICTMENT—APPLICABILITY OF STATE LAWS.

Indictments in federal courts are not amenable to state laws.

4. PROSTITUTION ⚷4—WHITE SLAVE ACT—EVIDENCE—SUFFICIENCY.

In a prosecution under White Slave Act, § 3, evidence *held* to support a verdict of guilty.

5. CRIMINAL LAW ⚷1169(5)—IMPROPER EVIDENCE—HARMLESS ERROR.

In a prosecution for a violation of White Slave Act, § 3, that the court received secondary evidence of the contents of two telegrams, which later had to be stricken out because the government was unable to make the preliminary proofs, was not reversible error, the defendant making no objection to the procedure nor requesting a stronger admonition to the jury, or asking that other means be adopted for his protection, competent proof convincingly pointing to the guilt of defendant.

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6. PROSTITUTION ⟹4—WHITE SLAVE ACT—EVIDENCE—TELEGRAPH COMPANY RECORDS.

To show that defendant induced a woman named to travel from California to Mexico, the records of a telegraph company, showing that defendant had a charge account with it and that a few days before she made the trip he had sent telegrams addressed to the city where she then was, showing only the surname of the addressee, which was the same as that of the woman named, were material.

In Error to the District Court of the United States for the Southern Division of the Southern District of California; Oscar A. Trippet, Judge.

James B. Simpson, indicted as James B. Miller, was convicted of a violation of the White Slave Act, and brings error. Affirmed.

Alfred F. MacDonald and Jud R. Rush, both of Los Angeles, Cal., for plaintiff in error.

Albert Schoonover, U. S. Atty., and J. Robert O'Connor and Clyde R. Moody, Asst. U. S. Attys., all of Los Angeles, Cal., for the United States.

Before GILBERT and HUNT, Circuit Judges, and DIETRICH, District Judge.

DIETRICH, District Judge. James B. Simpson, the plaintiff in error, was convicted of a violation of section 3 of the White Slave Act (36 Stat. 825), which provides that any person who shall knowingly induce "any woman or girl to go from one place to another in interstate or foreign commerce * * * for the purpose of prostitution or debauchery or for any other immoral purpose, or with the intent and purpose on the part of such person that such woman or girl shall engage in the practice of prostitution or debauchery or any other immoral practice," etc., shall be punished as therein directed. There are two counts in the indictment, in the first of which the defendant is charged with having unlawfully induced one Vida White, alias Rogers, to travel in interstate commerce from California to Tia Juana, in the republic of Mexico, "for a certain immoral purpose, to wit, for the purpose of placing said Vida White, alias Vida Rogers, in a house of prostitution and having her remain therein." The sufficiency of this count we need not consider, for upon it the defendant was acquitted. The second count, upon which he was found guilty, is in all particulars identical with the first, except that here it is charged that the defendant's purpose was to have the woman "manage a house of prostitution and conduct a place where persons of the opposite sexes meet and have illicit sexual intercourse."

[1] It is first contended that the indictment is insufficient for the reason that the management of a house of prostitution does not come within the denunciation of the statute, in that, as is claimed, only the personal sexual immorality of the woman induced to travel in interstate commerce is contemplated, and a woman may conduct a house of prostitution without engaging in such immoral practice. We do not think the scope of the statute is limited to cases of personal acts of

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sexual immorality upon the part of the woman transported. It is to be conceded that under the rule of ejusdem generis, the phrase "other immorality" implies sexual immorality, but it would be too rigorous an application of this rule to limit the phrase to the personal sexual immorality of the woman herself. It is well understood, of course, that the general purpose of Congress in enacting the law was to check the spread of prostitution and other forms of sexual debauchery by denying, in a large measure, to those engaged in that business, the facilities of interstate commerce, and for one having a house of prostitution in Mexico to induce a woman to go there to become the efficient means for maintaining what is perhaps the most offensive form of the evil against which the statute is expressly directed would admittedly be violative of the letter, and, as we think, clearly contrary to the spirit, of the statute. This view is thought to be supported by the construction placed upon the act in the Athanasaw Case, 227 U. S. 326, 33 Sup. Ct. 285, 57 L. Ed. 528, Ann. Cas. 1913E, 911, and is not inconsistent with anything decided by this court in Suslak v. United States, 213 Fed. 913, 130 C. C. A. 391.

[2, 3] It is further objected that the indictment does not conform to the California Penal Code. But it charges the offense in the language of the statute, and sets it forth with sufficient particularity to enable the defendant intelligently to prepare his defenses; no more is required. Indictments in the federal courts are not amenable to state laws.

[4] It is next assigned that the evidence is insufficient to support the verdict, and emphasis is particularly laid upon the dearth of proof touching the averment that the defendant induced the woman to go to Mexico. There is direct evidence that defendant owned and operated a house of ill fame, called The Palace, at Tia Juana, that on the day after Thanksgiving in 1915 Vida Rogers and another woman by the name of Louise Bordeau left a house of like character in San Francisco and went directly to San Diego, where they were met at the train by the defendant; that the next day they were both at Tia Juana in The Palace, the former as "mistress" and the latter as an inmate, together with about 20 other women. The defendant also was there, and from that time on he often came there, and dined at the restaurant connected with the house and frequented by the women. It was further shown that Vida White, or Rogers, received two telegrams at San Francisco, one a few days before she went to Tia Juana, and the other about two weeks earlier. These telegrams are not in the record, but it is shown that during this period the defendant, who with his wife occupied rooms at the Victoria Apartments in San Diego, had a "charge account" with the Western Union Telegraph Company, and according to the records of this company he sent a telegram to one White, at San Francisco, on November 15th, and another on November 23d. It further appears that he was acquainted with Vida White and visited her upon several different occasions at the house of ill fame in San Francisco, where she was the "mistress." The jury doubtless found that defendant induced her to go to Tia Juana by the promise of compensation, either contingent or absolute, in consideration of

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her taking charge of the house. That such an arrangement must have existed almost immediately after she got into Mexico is scarcely open to question, and it is a fair inference that it was entered into before she left San Francisco. Upon the whole, while perhaps remotely circumstantial, the evidence is of such character as almost irresistibly to produce conviction of the defendant's guilt.

[5] It is also assigned as error that the court received secondary evidence of the contents of the two telegrams above referred to. At the close of the case for the government it was stricken out, with instructions to the jury not to give it place in their consideration. That it was improvidently received is conceded, and the only question now is whether under all the circumstances its reception constitutes reversible error. It is hardly necessary to say that we do not commend the course pursued, for the reception of incompetent evidence is always attended with peril, even though it may be stricken out later on. And here there was apparently no substantial reason for not first requiring the preliminary proofs which it later turned out the government was unable to produce. But, it is to be noted, there can be no suspicion that the prosecution acted in bad faith, for the district attorney volunteered to withdraw the proffered telegrams until the requisite preliminary proofs could be made. It was upon the court's own motion that the testimony was received, subject to a motion to strike it out later on, and to this course no objection was raised by the defendant. Nor, when subsequently the testimony was stricken out, was there any request or suggestion that a stronger admonition be given to the jury, or that other means be adopted for the protection of the defendant against possible prejudice. Counsel for the defendant was presumably in a position more quickly to anticipate or apprehend jeopardy to his client than any one else, and it is not unreasonable to assume that upon an objection to the suggested course the court would have refrained from pursuing it; and if, at the time the evidence was stricken out, or later, there had been a request that the jury be more particularly warned against the danger of being unconsciously influenced by the incompetent testimony, the court would doubtless have granted it. If there were any evidence of bad faith on the part of the prosecution, or if the court had declined to give heed to any reasonable complaint or suggestion on the part of the defendant, or if we entertained any substantial doubt of the correctness of the verdict, we would not hesitate to direct a new trial. But the government ought not to be put to the necessity of retrying the case because of an incident treated so casually by all parties, when the competent proofs quite convincingly point to the defendant's guilt.

Under the well-established rule that exceptions to instructions must be specific (see rule 10 of this court [208 Fed. vii, 124 C. C. A. vii]), the defendant's general exception might, with propriety be wholly ignored, but we have examined the instructions, and we are satisfied that upon the whole the jury was fairly and adequately advised of the law.

[6] Although there are no assignments covering the admission of the two exhibits offered by the government involving the records of the

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telegraph company, we are asked to review the action of the court in this respect, upon the ground that it was palpably erroneous and manifestly prejudicial to the defendant. In this view we cannot concur. With or without the contents of the telegrams, the evidence was clearly material, and upon the whole, while its competency is not entirely free from doubt, it is thought the preliminary proofs were sufficient to warrant its admission.

The judgment is affirmed.

(245 Fed. 282)

REDERIAKTIEBOLAGET AMIE v. UNIVERSAL TRANSP. CO., Inc.

(Circuit Court of Appeals, Second Circuit. August 20, 1917.)

1. COURTS ⟹405(1)—FEDERAL COURTS—CIRCUIT COURT OF APPEALS—PRACTICE.

   Appeals and writs of error are to be taken to the Circuit Court of Appeals in the manner practiced in the Supreme Court before 1891.

2. APPEAL AND ERROR ⟹399—"WRIT OF ERROR"—FUNCTIONS—"CITATION."

   A writ of error operates proprio vigore to remove the record, while the citation gives notice to the parties and brings them into court.

   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Citation; Writ of Error.]

3. COURTS ⟹405(14)—FEDERAL COURTS—CIRCUIT COURT OF APPEALS—WRIT OF ERROR—PERFECTION.

   Under Rev. St. § 1000 (Comp. St. 1916, § 1660), declaring that every justice or judge signing a citation on any writ of error shall, except in cases brought by the United States, or under the direction of any department of the government, take good and sufficient security that plaintiff in error or appellant shall prosecute his writ or appeal to effect, and if he fail shall answer all damages and costs, where the writ is a supersedeas and stays execution, or all costs where it is not a supersedeas, a writ of error, but for Supreme Court rule 29 (32 Sup. Ct. xii), of which rule 13 for the Circuit Courts of Appeals (150 Fed. xxviii, 79 C. C. A. xxviii), is a copy, and which declares that supersedeas bonds in District Courts and Circuit Courts of Appeals must be taken, with good and sufficient security, that plaintiff in error or appellant shall prosecute his writ of error to effect, and answer all damages and costs if he fails to make his plea good, might be perfected and the cause heard without any security at all, except for costs.

4. COURTS ⟹405(15)—FEDERAL COURTS—CIRCUIT COURT OF APPEALS—WRIT OF ERROR—SUPERSEDEAS BOND.

   Under Supreme Court rule 29, of which rule 13 for the Circuit Court of Appeals is a copy, and which requires the giving of a supersedeas bond, the failure of plaintiff in error to give a supersedeas bond does not, as but for the rule the writ of error might be prosecuted, under Rev. St. § 1000 (Comp. St. 1916, § 1660), without giving such bond, affect the jurisdiction of the Circuit Court of Appeals, for the writ of error of itself removes the cause, and the failure to give such bond is a mere irregularity, and so it is within the power of any Circuit Judge or judge of the Circuit Court of Appeals to fix such bond after expiration of the 60-day period prescribed by section 1007 (section 1666).

5. COURTS ⟹405(15)—FEDERAL COURTS—CIRCUIT COURT OF APPEALS—WRIT OF ERROR—SUPERSEDEAS BOND—AMOUNT.

   Where the judge signing a writ of error and citation fixed the amount of the supersedeas bond by formal order, a judge of the Circuit Court of Appeals will not interfere with the amount fixed in the order for the supersedeas bond, though plaintiffs in error induced such judge to sign

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the citation without producing the bond, for, such judge having made a decision, a subsequent judge should not interfere therewith.

6. ATTACHMENT ⟹1—PERSONAL ACTION—NATURE OF.

Where there was personal service on defendant, though its property was attached, the action is a personal one; the attachment being for purposes of security only.

7. COURTS ⟹405(15)—FEDERAL COURTS—CIRCUIT COURT OF APPEALS—WRIT OF ERROR—SUPERSEDEAS BOND.

Plaintiff in error instituted an action against defendant by personal service, but attached defendant's interest in a ship over and above a maritime lien. The ship was discharged, both from the lien and from the attachment, by the execution and filing of one instrument, which first secured the maritime lien, and, junior to that lien, the attachment and ensuing judgment pro tanto. *Held* that, despite the unique nature of the security and that as plaintiff's attachment of the ship was accidental he had the right to issue execution on rendition of a judgment, and a supersedeas bond was necessary, under rule 13 for Circuit Courts of Appeals, where defendant sued out a writ of error.

In Error to the District Court of the United States for the Southern District of New York.

A writ of error to the District Court for the Southern District of New York having been taken out by plaintiff in error (defendant below), the same having been allowed and citation issued, a motion is made in this court to "fix the amount of the supersedeas bond to be given in this case." Plaintiff restrained from issuing execution, provided defendant completes its security within 10 days from filing the order.

Saul S. Myers and Thomas B. Nixon, both of New York City, for plaintiff in error.

Kirlin, Woolsey & Hickox, of New York City, for defendant in error.

Before HOUGH, Circuit Judge.

HOUGH, Circuit Judge. This motion having been duly made before me, it is thought to be my duty to hear it. That, however, does not assume that I have, therefore, any power to grant the relief moved for.

[1] Whether a single judge of the Court of Appeals has power to regulate procedure on appeal in the way here demanded is not plain on the face of the statute; yet this much may be spelled out. Appeals and writs of error are to be taken to the Circuit Court of Appeals in the manner practiced in the Supreme Court before 1891. In similar proceedings in the Supreme Court in Peugh v. Davis, 110 U. S. 227, 4 Sup. Ct. 17, 28 L. Ed. 127, it was held that where an appeal had been allowed, but no security taken, a judge of the appellate court might take it more than 60 days after decree entered. No reason appears why the same might not be done on a writ of error.

In this case a writ was allowed and citation signed, and further an order was entered in the District Court fixing the amount of the bond to stay execution (commonly called a supersedeas bond); but the question remains, whether noncompliance with that order prevented the writ and citation from having their usual effect. The result of plain-

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tiff in error's argument is that noncompliance with the order of L. Hand, J., leaves the writ and citation operative, and entitles this court or a judge thereof to fix the bond, even at a figure utterly variant from that directed by the court below.

[2, 3] A writ of error operates proprio vigore to remove the record; a citation gives notice to the parties and brings them into court. Atherton v. Fowler, 91 U. S. 143, 23 L. Ed. 265; Cohen v. Virginia, 6 Wheat. 264, 5 L. Ed. 257. There is no doubt that (so far as statute is concerned) the plaintiff in error may review by writ a judgment at law, without seeking to stay execution on the judgment; i. e., without supersedeas. It therefore appears clear that, but for the operation of Supreme Court rule 29 (32 Sup. Ct. xii), of which our rule 13 (150 Fed. xxviii, 79 C. C. A. xxviii) is a copy, a writ may be perfected and the cause heard regularly without any security at all, except for costs, under R. S. § 1000 (Comp. St. 1916, § 1660).

[4] The nature of supersedeas and the origin of our use of the word is fully shown in Omaha Hotel Co. v. Kountze, 107 U. S. 378, 2 Sup. Ct. 911, 27 L. Ed. 609. Rule 29 was passed cotemporaneously with the decision in Rubber Co. v. Goodyear, 6 Wall. 153, 18 L. Ed. 762 (see this stated in Jerome v. McCarter, 21 Wall. 17, 30, 22 L. Ed. 515), and in order to quiet disputes which had prevailed in the Supreme Court itself as to whether the rule of Catlett v. Brodie, 9 Wheat. 553, 6 L. Ed. 158 (an action at law), applied to equity suits, and especially to foreclosures, ejectments, etc. The cases heretofore cited show directly or by reference the history of this difference of opinion concerning what is now section 1000, R. S., and was originally a section of the Judiciary Act of 1789. In the condition of practice created by rule 29, Brown v. McConnell, 124 U. S. 489, 8 Sup. Ct. 559, 31 L. Ed. 495, was decided, pointing out that a writ of error is process of the appellate court, while an appeal may be taken without any Supreme Court action at all, and further that security (which is what in our phrase "works a supersedeas") is given under R. S. § 1000, on signing citation, and that failure to take it is irregularity only, not "necessarily avoiding citation," and not affecting jurisdiction.

We must construe rule 13, C. C. A., as the Supreme Court has done, with rule 29, S. C. Under such construction, I think that the writ and citation herein have duly removed the record to and brought the parties into this court without any supersedeas bond; that such lack does not affect our jurisdiction, but is an irregularity, and leaves it within the power of any Circuit Judge of the circuit, or of the Circuit Court of Appeals itself, to fix such bond, even after the 60-day period of R. S. § 1007 (Comp. St. 1916, § 1666), has expired. What, under rule 13, the court would, should, or could do with the case, if no full bond is ever given, is not before me, and I express no opinion. Such opinion would depend (1) on a construction of rule 13 not now involved, and (2) on the power of this court to pass rule 13, or of the Supreme Court to pass rule 29, and in effect (perhaps) refuse longer to hear appeals and writs in which no security exists, or is given, except for costs.

[5] The first inquiry here is: How did this irregularity which gives me jurisdiction occur? None was intended, for when L. Hand, J.,

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signed writ and citation, he fixed the amount of the supersedeas bond by formal order, which these plaintiffs in error have refused to obey. This sort of order is the common practice, and judges assume that the order entered is enough; never before have I known a citation availed of without complying with the cotemporaneous order as to security.

The reason for this singularity is that Hand, J.'s order is said to be so plainly in the face of rule 13 as to be null, wherefore in effect no lawful order was made, and this application is made on a (legally) clean slate. The argument for this application is not put just that way, but such is its necessary logical implication. I shall not stop to discuss the admissibility of such contention. I am satisfied of my jurisdiction, and there are two reasons why the action of Hand, J., will stand so far as I am concerned:

(1) His relation to this case on writ is just the same as mine might have been. I could have allowed the writ, signed the citation, and taken the security; so could any other Circuit Judge or District Judge sitting in the Southern district of New York. Plaintiff in error chose to go to Judge Hand, and he made decision. As matter of discretion and of law I would refuse to review his action when sitting alone. Plaintiff in error should take nothing by the fact that the citation was signed, without actually seeing the bond, for it is beyond all doubt that such actual production of a "good and sufficient" bond might have been insisted on as strict matter of law, before any judge affixed his name to any citation.

[6, 7] (2) I agree with Hand, J., as to the construction of rule 13. This is an action at law in which an attachment issued. There was personal service of defendant below, or its equivalent; therefore the attachment was no more than mesne process and the attached property only security (so far as it goes) for a judgment in personam. The attached property was whatever defendant below owned in a ship, over and above a maritime lien which has now ripened into a final decree for about one-third of the value of the vessel. The ship was discharged both of the maritime lien and from the attachment herein by the execution and filing of one rather hybrid document for her total value. In form that document is a stipulation for value, and from its tenor I think it clear that it first secures the maritime lien, and junior to that lien the attachment and ensuing judgment pro tanto.

But the usual clauses of an admiralty stipulation apply to both the admiralty case and common-law action; it is a continuing security in both trial and appellate courts, and is not collectible after appeal or writ taken until the appellate court has spoken favorably to libelants and original plaintiffs. Therefore here by an unusual but clear undertaking defendants below have given partial security,—the action otherwise is an ordinary common-law suit in personam (Cooper v. Reynolds, 10 Wall. 308, 19 L. Ed. 931), and not one in which "the property in controversy necessarily follows the suit." That phrase (even without the illustrations given by the rule itself) refers to suits seeking to recover specific property or adjudicate liens in or rights to some particular realty or chattels. This is no such case. Plaintiff below happened to attach a ship; he might as well have attached a credit or anything

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else belonging to his opponent—the warrant was general; the ship accidental.

The result is that the order of Hand, J., was right. Defendant in error has the right to issue execution as therein permitted. Such right will be enjoined if plaintiff in error completes its security within 10 days from filing order hereon. Security is fixed at the figure named in Hand, J.'s order. New order filed herewith.

(245 Fed. 286)

SOUTHERN TRUST CO. et al. v. LUCAS.

(Circuit Court of Appeals, Eighth Circuit. September 5, 1917.)

No. 4870.

1. FRAUD ⟹7—FIDUCIARY RELATIONS—HOW CREATED.

Where the parties to a transaction are strangers, they remain such, unless both consent by word or deed to an alteration of such status, and one party, by pleading ignorance and inexperience, and declaring her reliance upon the other, cannot impose a fiduciary obligation or status on such other without his consent.

2. TRIAL ⟹296(2)—INSTRUCTIONS—CURE BY OTHER INSTRUCTIONS.

In an action for fraud on an exchange of an apartment house by plaintiff for a farm owned by defendant's client, an instruction stating that one of the issues was whether there was "a condition of confidence, a reliance by the plaintiff on the defendants, she having informed them that she had no experience in such matters and relied upon them," though erroneous, was not fatal error, where another part of the charge required a finding that plaintiff depended entirely upon defendants' agents and told them so, and that they assumed to act in that capacity.

3. FRAUD ⟹23—FIDUCIARY RELATIONS—HOW CREATED.

Where a trust company, which negotiated an exchange by plaintiff of an apartment house for a farm owned by one of its clients, sought the handling of plaintiff's property, and with full knowledge of her inexperience and desires, and her reliance on its protection and representation of her interests, proceeded under conditions justifying her in believing that they were caring for her interests, they could not abuse her confidence, but were bound to care for her interests and exercise good faith in so doing.

4. FRAUD ⟹11(2)—FRAUDULENT REPRESENTATIONS—VALUE—FACTS OR OPINIONS—"STATEMENT OF FACT."

While a statement as to value is in one sense an expression of an opinion and in most cases nothing more, where it is made under conditions which show that it was intended to be treated as an immediate factor inducing action, and was made with knowledge that it would be accepted as a basis of action, instead of a mere element to be investigated before action, it becomes for all practical purposes a statement of fact.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Statement of Fact.]

5. TRIAL ⟹296(10)—INSTRUCTIONS—CURE BY OTHER INSTRUCTIONS.

In an action for fraud in negotiating an exchange of properties, the court's characterization of expert testimony as to what constituted value in real estate as a joke, and his further statement, when objection was made, that he had used a mild term, though they might better have been omitted, were not prejudicial, where in this immediate connection

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the court clearly stated his reasons for the use of the expression, and what he meant by it, and impressed on the jury that what he said was not binding on them, and that they must judge the facts for themselves.

In Error to the District Court of the United States for the Eastern District of Arkansas; Jacob Trieber, Judge.

Action by Ollie Lucas against the Southern Trust Company and another. Judgment for plaintiff, and defendants bring error. Affirmed.

W. B. Smith and J. H. Carmichael, both of Little Rock, Ark. (J. Merrick Moore and W. H. Rector, both of Little Rock, Ark., on the brief), for plaintiffs in error.

E. L. McHaney and George W. Murphy, both of Little Rock, Ark., for defendant in error.

Before HOOK, SMITH, and STONE, Circuit Judges.

STONE, Circuit Judge. Error from judgment for $14,963.66 as damages through deceit. The cause of action and proof for the plaintiff below was as follows:

An invalid widow, who owned an apartment house, being desirous of turning it into money, so that she could go with her aged father and small daughter to California, was induced by representatives of the trust company to permit them to exchange the apartment house for a large farm. The trust company officials represented to her that they would exchange her property for a farm which they said they knew to be worth $30,000; that they could and would then readily sell the farm, and, after taking out their stipulated commission, turn over to her a balance of $23,000. She told them that she knew nothing of farms or farming, or of farm values, did not want a farm, but wanted to convert the apartment house into money, and that this was the only property she had and her sole means of support. Relying upon their above assurances that the farm was of such value, and that they could within 30 days realize upon it for her the above sum in cash, she placed her property in their hands for such disposition. Before and during the time of the above representations and negotiations the company was, without her knowledge, the agent for the owner of said farm, and had unsuccessfully tried to dispose of it for a sum much less than the value of her property, and the officials knew the true value of the farm. Their representations to her were knowingly false, and made for the purpose of deceiving her and acquiring her property. She relied upon their statements of the value of the farm, what they could do with it, and that they were representing her as agent in the transaction. The defendant company in its pleadings and evidence challenged the plaintiff on all material points.

In the course of the charge to the jury occurs the following:

"So the issues in this case, gentlemen, which you are to determine are three: First, was there a condition of confidence, a reliance by the plaintiff on the defendants, she having informed them that she had no experience in such matters and relied upon them? That is the first issue to be determined. Second, were there false and fraudulent representations made by the defendant, or its agents, as to the value of the farm to the plaintiff which were material and which the plaintiff was induced to believe to be true and on the strength of it made that trade when she would not have made it if

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the true facts had been stated to her? That is the second issue. Third, if what she alleges is true as to these two first issues, was the farm which she obtained worth less in value than the property which she exchanged? If it was worth as much as much or was worth more, then she was not injured and could not recover."

The defense was that no such representations had been made but that she had dealt at arm's length upon her own judgment after inspecting the farm; that any statements of value by the company officials were mere expressions of opinion; that the farm was equal in value to her property, so that she had suffered no loss.

The company attacks the first item in the charge of the court by saying:

"The court evidently intending to say that the defendant in error could create a fiduciary relation by simply telling the agent of plaintiffs in error that she relied upon his statement. We think a fiduciary relation is one of trust, confidence, and is a status, and that it cannot be created by the vendor stating to the purchaser that she is relying wholly upon the judgment of the purchaser as to what the property she is selling is worth."

[1] It is true that one party cannot create a legal obligation or status by pleading ignorance and inexperience to an opposing party in a business transaction. Those who have in the law's view been strangers remain such, unless both consent by word or deed to an alteration of that status. The communicated desire or intention of one to impose upon the other a different status, involving greater obligations, is ineffective, unless the other consents to the changed relation. It is true that consent may find expression in acts as readily as in words. But such consent cannot be implied from a bare procedure with the transaction, after one party has declared his or her inexperience and reliance upon the other. The knowledge of this state of mind in a party may be an important consideration in determining the existence of fraud, as indicating what effect might be anticipated from statements made; but it cannot establish a confidential legal status.

[2, 3] If the above quotation were the entire charge upon that point, it would be fatal error. But another part of the charge requires a finding that:

"In this transaction Mrs. Lucas depended entirely upon the Southern Trust Company's agents and had told them so, *and that they had assumed to act in that capacity* (italics ours)."

They cannot accept her confidence, and abuse it to her hurt. They cannot consent that she rely upon them, and deceive her through that very reliance. Much less can they deceive her, both as to the justification of that reliance and also as to the facts which would be protected thereby. Here the pleading and her proof were that the company's officials had sought the handling of her property, and, with full knowledge of her inexperience, desires, and reliance upon their protection, and their representation of her interests, had proceeded under conditions which would have justified her in believing that they were caring for her interests. Such a situation creates the obligation upon them to do so, and to exercise good faith in so doing.

[4] As to the second point, respecting the representations as to value: A statement as to value is from its very nature, in one sense,

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an expression of opinion. In most instances it rises to no greater dignity. But where it is made under conditions which show that it was intended by the one uttering it to be treated as an important factor inducing action, and was made with knowledge that it would be accepted as a basis of action, instead of a mere element to be investigated by the other before action, it becomes, for all practical and effective purposes, a statement of fact, and is classed as such. There was here testimony justifying that view by the jury.

As to the third point, regarding the claimed absence of damage, because the value of the farm at least equaled that of the apartment house, it is enough to say that was a question of fact for the jury, upon conflicting evidence.

[5] A further point is urged in claimed prejudicial language used in the charge. In commenting upon the testimony of certain experts, who had testified as to what constituted value in real estate, the court characterized it as a "joke," and later, on objection to that language, said he had used a mild term. This language was extreme, and would better have been omitted. In immediate connection therewith, however, the court clearly stated his reasons for the use of the expression and what he meant by it; also, the court was very careful to impress upon the jury that what he might say was not binding upon them, and that they must themselves be the judges of the facts. We are not prepared to say that, in a closer case, the effect of this language might not be prejudicial; but we do not think it should be so regarded here.

The judgment is affirmed.

(245 Fed. 289)

VIAVI CO. v. VIMEDIA CO. et al.*

(Circuit Court of Appeals, Eighth Circuit. September 3, 1917.)

No. 4800.

1. TRADE-MARKS AND TRADE-NAMES ⟹59(5)—IMITATION OF NAMES—DESCRIPTIVE WORDS.

   The words "cerate," "capsules," "suppositories," "tablets," "liquid," "laxative," and "pencils," as applied to proprietary medicines, are not subject to exclusive appropriation as trade-names; and hence, where plaintiff sold such medicines as "Viavi Capsules," "Viavi Suppositories," etc., defendants' manufacture and sale of similar medicines as "Vimedia Capsules," "Vimedia Suppositories," etc., was not an imitation of plaintiff's names.

2. TRADE-MARK AND TRADE-NAMES ⟹59(5)—IMITATION—NAMES OF ARTICLES.

   Where plaintiff sold a proprietary medicine as "Viavi Royal," defendants' sale of a medical preparation as "Vimedia Sovereign" was not a deceptive imitation; the words "sovereign" and "royal" being distinct in form and suggestion.

3. TRADE-MARKS AND TRADE-NAMES ⟹70(1)—UNFAIR COMPETITION—IMITATION.

   It was not unfair competition for a manufacturer and seller of proprietary medicines to use books, charts, circulars, and printed forms having a general resemblance to those of another, in the same business, as to contents, such as anatomical plates, description of diseases and symptoms, and advice to the sick; such material being common in the domain of

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 *Rehearing denied December 10, 1917.

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the proprietary medicine business, and no one having a monopoly of these forms of expression.

4. TRADE-MARKS AND TRADE-NAMES ⟹77—UNFAIR COMPETITION—INTERFERENCE WITH BUSINESS.

It was not unfair competition for a manufacturer and seller of proprietary medicines to solicit and offer inducements and persuasions to the customers and agents of a competitor to become its customers and agents, where no contract relations were threatened.

5. TRADE-MARKS AND TRADE-NAMES ⟹70(1)—UNFAIR COMPETITION—IMITATION.

In the absence of such a monopoly as a patent confers, any person may reproduce the proprietary medicines of another, and sell them under representations that they are the same article, if not sold as such other manufacturer's goods.

6. TRADE-MARKS AND TRADE-NAMES ⟹70(4)—IMITATION—PACKAGES AND LABELS.

Neither the use of the same colors nor of the same form of containing vessels, cartons, or labels constitutes unfair competition, when such features are in common use in the trade, especially when they serve purposes of utility, convenience, or attraction.

7. TRADE-MARKS AND TRADE-NAMES ⟹70(4)—IMITATION—PACKAGES AND LABELS.

Defendant used bottles, boxes, and tins for its proprietary medicines similar to those of plaintiff, and inclosed them in cartons having a general correspondence in form and color, and the labels were of similar sizes and colors and had the same general style of letters. The forms of the containers, however, were such as were naturally suggested by the necessities of the business, and the colors presented no unusual characteristics. Plaintiff's engraved scrolls and symbols were not copied, and its trade-name, "Viavi," did not appear on defendants' articles, while its own trade-name, "Vimedia," was constantly repeated and printed in type of large size, while defendant's name and address appeared in conspicuous letters. There was no persuasive testimony that purchasers had been actually deceived. *Held* that, notwithstanding the resemblances of colors and form, the difference in other respects in the dress of the goods was such that there was no unfair competition.

Stone, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Western District of Missouri; Arba S. Van Valkenburgh, Judge.

Suit by the Viavi Company against the Vimedia Company and others. From a decree in favor of defendants, plaintiff appeals. Affirmed.

John A. Barnes, of Chicago, Ill., and Arthur Miller, of Kansas City, Mo. (New, Miller, Camack & Winger, of Kansas City, Mo., on the brief), for appellant.

Frank T. Brown, of Chicago, Ill., and Henry D. Ashley, of Kansas City, Mo. (Charles M. Nissen, of Kansas City, Mo., Arthur L. Sprinkle, of Chicago, Ill., and Ashley & Gilbert, of Kansas City, Mo., on the brief), for appellees.

Before CARLAND and STONE, Circuit Judges, and MUNGER, District Judge.

MUNGER, District Judge. This suit was brought to restrain unfair competition in business and to protect what was claimed to be a trade-mark and a trade-name. The appellant and its predecessors in in-

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terest for many years have been engaged in making and vending proprietary medicines to which it has applied the name "Viavi." It is claimed that the name was registered as a trade-mark in 1891. The medicines are put up in bottles, in cylindrical wooden boxes, and in tin boxes, and these are inclosed in cardboard cartons of ordinary forms. The general method of sale was the procurement of local representatives, who purchased the medicines, and who were given the right of sale in limited territory. These representatives solicited customers among those supposed to be ailing, to whom the medicines were supplied for use. The goods were not sold through the ordinary means of drug and chemical stores. The defendant Fuller, with an associate, became local representatives of appellant at Kansas City, Mo., in 1899, and continued under the name of the Missouri Viavi Company, until 1903, to procure and vend the goods of appellant. In the latter year the defendant Laederich joined Fuller and his associate, and they formed a new company, called the Missouri Viavi Company, to continue the same business in a larger territory. Mr. Fuller retained this connection until 1905, when he withdrew and caused the incorporation of a company known as the Vimedia Company. It obtained the registration of the word "Vimedia" as a trade-mark in 1906. The Vimedia Company have also been engaged in the manufacture and sale of proprietary medicines of the same general type as those made by the Viavi Company. The word "Vimedia" has been applied to these medicines. They were put up in containers of the same general style as those of the rival company and were sold by the same general plan of local representatives.

The Viavi Company made and sold medicines it called "Viavi Capsules," "Viavi Suppositories," "Viavi Cerate," "Viavi Tablettes," "Viavi Liquid," "Viavi Laxative," "Viavi Pencils," and "Viavi Royal." The Vimedia Company has made and sold medicines it called "Vimedia Capsules," "Vimedia Suppositories," "Vimedia Cerate," "Vimedia Tablets," "Vimedia Liquid," "Vimedia Laxative," "Vimedia Pencils," and "Vimedia Sovereign."

[1, 2] In 1911 Laederich became a stockholder and officer in the defendant company and has been engaged in its service ever since. The suit asked the same relief against the persons made defendants as was asked against the Vimedia Company. A large amount of testimony was presented on the hearing of the issues, and the trial court entered a decree in favor of the defendants. Appellant has abandoned its claim of infringement of the trade-mark "Viavi," and it concedes that the word "Vimedia," standing alone, is not an infringement of the trade-name "Viavi"; but it asserts that an injunction should have issued against the use of the word "Vimedia," in conjunction with the words already stated, as appellations of medicines. The words "cerate," "capsules," "suppositories," "tablets," "liquid," "laxative," and "pencils" are not distinctive of appellant's medicines, nor subject to its exclusive appropriation as trade-names. They are properly descriptive of the goods, are well-known terms of trade, and were in similar use long before appellant began business; and hence the defendant company's use of the words cannot be said to be an imitation of appellant's

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peculiar terms. They are similar to such words as "pills," "tonic," "lozenges," etc. The word "sovereign" is so distinct in form and suggestion to the word "royal," as applied to a medical preparation, that it cannot be called a deceptive imitation.

[3] The remaining questions relate to practices that are said to constitute unfair competition. Both of the companies use books, charts, circulars, and printed forms that have general resemblances as to contents, such as anatomical plates, descriptions of diseases and symptoms, and advice to the sick. The material used is common in the domain of the proprietary medicine business, and, as no copyright is relied upon for special protection, the plaintiff has no monopoly of these forms of expression. Atlas Mfg. Co. v. Street & Smith, 204 Fed. 398, 122 C. C. A. 568, 47 L. R. A. (N. S.) 1002; S. R. Feil Co. v. John E. Robbins Co., 220 Fed. 650, 136 C. C. A. 258; John D. Park & Sons Co. v. Hartman, 153 Fed. 24, 82 C. C. A. 158, 12 L. R. A. (N. S.) 135; Black v. Ehrich (C. C.) 44 Fed. 793.

[4] In building up the selling agencies of the Vimedia Company, some who had acted as selling agents for the Viavi Company and some who had purchased goods from it were solicited to become agents and customers of the Vimedia Company. Complaint is made that this constituted a raid upon appellant's business organization beyond the limits of fair competition. The evidence does not show any plan on the part of the defendant company to induce employés of the appellant to break contract relations with it. Inducements and persuasions were offered to those who had dealt with appellant to deal thereafter with the Vimedia Company; but it is legal business rivalry and competition for one to induce customers of one person to become patrons of another by honest persuasion, where no contract relations are threatened, else a new business establishment could rarely gain a foothold. West Virginia Transp. Co. v. Standard Oil Co., 50 W. Va. 611, 40 S. E. 591, 56 L. R. A. 804, 88 Am. St. Rep. 895; Farmers' Loan & Trust Co. v. City of Sioux Falls (C. C.) 131 Fed. 890; Passaic Print Works v. Ely & Walker Dry Goods Co., 105 Fed. 163, 44 C. C. A. 426, 62 L. R. A. 673; Lough v. Outerbridge, 143 N. Y. 271, 38 N. E. 292, 25 L. R. A. 674, 42 Am. St. Rep. 712; Johnson v. Hitchcock, 15 Johns. (N. Y.) 185.

[5] In some instances the local sellers of the Vimedia preparations have represented to prospective purchasers that the articles were the same or as good as Viavi. Apart from the question of the responsibility of the defendant company for these representations lies the fact that appellant has no patent for these medicines. In the absence of such a monopoly as a patent confers, any persons may reproduce the articles, if they can, and may sell them under the representation that they believe they are the same article, if they exclude the notion that they are the plaintiff's goods. Saxlehner v. Wagner, 216 U. S. 375, 30 Sup. Ct. 298, 54 L. Ed. 525; John D. Park & Sons Co. v. Hartman, 153 Fed. 24, 82 C. C. A. 158, 12 L. R. A. (N. S.) 135; Tabor v. Hoffman, 118 N. Y. 30, 23 N. E. 12, 16 Am. St. Rep. 740; Chadwick v. Covell, 151 Mass. 190, 23 N. E. 1068, 6 L. R. A. 839, 21 Am. St. Rep. 442; Singer Mfg. Co. v. June Mfg. Co., 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118.

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[6] Both of the companies use similar bottles, boxes, and tins to contain the medicines prepared by them, and the cartons used to inclose them have a general correspondence in form and color. The labels on the containers and cartons are also of similar sizes and colors and have the same general style of letters. There is nothing unusual or distinctive in this dress of goods. Neither the use of the same colors, or of the same form of containing vessels, cartons, or labels, alone constitutes unfair competition, when such features are in common use in the trade, and especially when these features serve purposes of utility, convenience, or attraction. P. Lorillard Co. v. Peper, 86 Fed. 956, 30 C. C. A. 496; Globe-Wernicke Co. v. Fred Macey Co., 119 Fed. 696, 56 C. C. A. 304; Marvel Co. v. Pearl, 133 Fed. 160, 66 C. C. A. 226; Sterling Remedy Co. v. Eureka Chemical & Manufacturing Co., 80 Fed. 105, 25 C. C. A. 314.

[7] The forms of these containers are such as are naturally suggested by the necessities of the business in which they are used, and the pale yellow color of the cartons, the yellow labels with black letters, and the white labels with black letters present no unusual characteristics. The engraved scrolls and symbols appearing on the Viavi Company's goods have not been copied, nor does the word "Viavi" appear thereon. The paper used for labels and to cover all cartons by the defendant company has imprinted upon it in diagonal lines the word "Vimedia," constantly repeated, so that the word occurs 36 times on each square inch. The word "Vimedia" is printed in type of large size on each container and carton. On appellant's goods appears the legend that they are prepared by the Viavi Company, Incorporated, at San Francisco, Cal., U. S. A., and at Windsor, Ont., Can., while on defendant company's goods appears the legend in equally conspicuous letters that they are prepared by the Vimedia Company, Kansas City, Mo., U. S. A., Windsor, Ont., Can.

There is no presuasive testimony that purchasers have actually been deceived by any confusion of the goods. Notwithstanding the resemblances of colors and forms, the difference in other respects in the dress of the goods is such as to persuade that no one of ordinary intelligence will be deceived. Coats v. Merrick Thread Co., 149 U. S. 562, 13 Sup. Ct. 966, 37 L. Ed. 847; Singer Mfg. Co. v. June Mfg. Co., 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118; Kann v. Diamond Steel Co., 89 Fed. 706, 32 C. C. A. 324; P. Lorillard Co. v. Peper, 86 Fed. 956, 30 C. C. A. 496; Proctor & Gamble Co. v. Globe Refining Co., 92 Fed. 357, 34 C. C. A. 405; S. R. Feil Co. v. John E. Robbins Co., 220 Fed. 650, 136 C. C. A. 258; Wolf Bros. & Co. v. Hamilton-Brown Shoe Co., 206 Fed. 611, 124 C. C. A. 409.

We think the decree of the lower court is right and should be affirmed.

STONE, Circuit Judge (dissenting). The appellees had been closely associated and were intimately acquainted with the entire business of appellant in all its methods, phases, and results. They started out to compete in the same field. There is no question in my mind of their

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close and intentional imitation of appellant's business methods, packages, and literature, in outline and in many details. Everywhere are earmarks suggesting a consciousness that the imitation could not lawfully be exact, joined to an executed intention of going to the very edge of what they deemed lawful imitation. While it may be that the form of many of the packages is utilitarian, that some of the business methods are open to public use, and that the name is slightly different, yet it is remarkable that such similitude in name, color of package, contents, and arrangement of literature could have been employed for any reason, except to confuse the present or prospective customers of appellant. This evident intention on the part of persons skilled in the trade and familiar with appellant's business and customers, when joined to actual instances of confusion on the part of such customers, as is shown by the evidence, makes a case of intentional and successful unfair competition.

(245 Fed. 294)

INTERSTATE NAT. BANK OF KANSAS CITY, MO., v. YATES CENTER NAT. BANK OF YATES CENTER, KAN., et al.*

(Circuit Court of Appeals, Eighth Circuit. September 5, 1917.)

No. 4887.

1. PRINCIPAL AND AGENT ⟹177(1)—NOTICE TO AGENT—PRESUMPTIONS.
The knowledge of an agent is imputed to the principal, on the presumption that the information was communicated by the agent by reason of the relation; but, where the circumstances surrounding the agent are such that he would naturally have concealed his knowledge from the principal, the law will not presume that it was communicated.

2. BANKS AND BANKING ⟹262—KNOWLEDGE OF OFFICIALS—IMPUTATION TO PRINCIPAL.
Where the president of a bank introduced a stockman to plaintiff, another bank, which was the metropolitan correspondent of the one of which he was president, and induced plaintiff to make loans to him on chattel mortgages, the notes being signed, not only by the stockman, but by the president, the president's knowledge that funds deposited in the bank of which he was an official to the credit of the stockman were the proceeds of sales of mortgaged cattle is not, by reason of his official position, imputable to the bank of which he was president, so as to impress such funds with a trust in favor of plaintiff; it apearing that the president induced the stockman to dispose of the mortgaged cattle without notifying plaintiff, or delivering the proceeds, and was a party to a scheme, with reference to the disposition of the cattle, which, if not criminal, was fraudulent and bordering thereon.

Appeal from the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

Bill by the Interstate National Bank of Kansas City, Mo., against the Yates Center National Bank of Yates Center, Kan., and Charles D. Hammer, substituted as receiver of the Yates Center National Bank in place of C. A. Korbly. From a judgment dismissing the bill, plaintiff appeals. Affirmed.

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*Rehearing denied November 19, 1917.

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W. F. Guthrie, of Youngstown, Ohio, and C. Angevine, of Kansas City, Kan., for appellant.

Altes H. Campbell, of Iola, Kan., for appellees.

Before HOOK, SMITH, and STONE, Circuit Judges.

STONE, Circuit Judge. Plaintiff appeals from dismissal of its bill to set aside satisfaction of three mortgages on the ground of fraud, and to have a preference declared as to funds in the hands of the defendant receiver equal in amount to the sum arising from wrongful disposition of the mortgaged property by the mortgagor which had been deposited in appellee bank and checked therefrom by the mortgagor.

The mortgages, satisfaction of which was sought to be set aside, were given by T. C. Ryan to secure the payment of certain notes, and covered cattle. After these mortgages had been in force for some time, and a small payment had been made thereon, for the purpose of consolidating the balances and securing an additional sum, a single note was given, secured by mortgage, purporting to cover all of the property included in the three mortgages, and thereupon those mortgages were canceled. Thereafter the plaintiff ascertained that, largely prior to the execution of this last note, the maker thereof had disposed of most of the chattel security at the instigation and procurement of one Ricker, the president of the defendant Yates Center National Bank, and that the funds arising from such disposition had been deposited in that bank with full knowledge, on the part of the president, both of their origin and of the existence of the mortgages. The bank having passed into the hands of a receiver, and the mortgagor having withdrawn his funds from the bank, this suit seeks to impound the funds coming into the possession of the receiver, equal in amount to the receipts from the cattle, and to secure a preference thereon.

The theory of the bill is that the money came to the bank accompanied by the knowledge of its improper origin, and therefore the bank and its succeeding receiver obtained and held it as trustee for the plaintiff. It is not disputed that the proceeds from the sold mortgaged cattle were deposited in the bank to Ryan's credit and later drawn out by him; that the president of the bank, Ricker, had, when they were deposited, accurate knowledge of their origin and the existence of the mortgages; and that no other person connected with the bank had any such knowledge until after Ryan had overdrawn his account. The crux of the case, therefore, is whether or not the knowledge of Ricker was, under these circumstances, the knowledge of the bank.

[1] The basis of imputing knowledge from an agent to a principal is that the principal cannot be heard to deny responsibility for knowledge acquired by his agent, which would affect his principal's business, and which he would naturally communicate to his principal or use for his benefit. The imputation of knowledge to the principal is but the application of a presumption that the information was communicated by the agent. Like most presumptions, it is based upon that legal method of working out justice which often is called into action by necessity, to wit, to treat as existent that which normally and naturally

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would occur, but which is difficult or impossible of direct proof by the party upon whom the burden of proof rests. If the circumstances surrounding the agent in respect to the knowledge are such that he would naturally conceal it from his principal, the law will not presume, in the absence of proof, that he did the unusual and unnatural thing of communicating it. Nor will it, proof being absent, hold his principal as possessing information he normally would not have.

[2] The high official position in the bank of Ricker, and his actual knowledge, would bind the bank, unless his connection with that knowledge was such as to preclude any theory or presumption of his communicating it to other officials of the bank, or using it for the benefit of the bank. To ascertain the situation of Ricker in this respect the court has carefully read and considered the entire evidence. Ricker was not a witness, and the record is strangely silent as to the cause of his absence. The testimony revealing Ricker's relation to the matter in question was from T. C. Ryan, who executed the notes and mortgages and sold the cattle; Helen F. Ryan, his wife; J. B. Ryan, a member of a stockyard commission company at Kansas City, and not connected with the other Ryans; R. M. Cook, vice president of the plaintiff bank; George S. Hovey, president of the plaintiff bank; and A. H. Gillis, formerly receiver of the defendant bank; numerous exhibits, including the notes, mortgages, account sales, and drafts covering the sale of the cattle; correspondence between Ricker and Mr. Cook or Mr. Hovey; and statements from the books of the two banks, including T. C. Ryan's account. This evidence shows Ricker, as president of a country town bank, introducing to plaintiff, the city correspondent of that bank, T. C. Ryan, who desired to borrow considerable sums of money to enable him to purchase cattle; the knowledge by Ricker, through previous dealings and acquaintance, that Ryan was a ranchman with little unincumbered property; the virtual certification of Ryan's financial worth by joining him as comaker on the notes to plaintiff; the receipt of a commission from the plaintiff for so doing; the apparent performance of some services for plaintiff, as presenting the notes for Ryan's signature, filing one or more of the mortgages for record, and inspecting the cattle covered by the mortgages; the insistence by him that Ryan sell the cattle and appropriate the proceeds without application on the mortgaged indebtedness or notification of the sale to plaintiff (a criminal act on Ryan's part and at a time when he—Ricker—was liable on the notes); Ryan's excuse that Ricker silenced his protest by saying that he was liable on the notes and would pay them; Ryan's dealings with defendant bank, always through Ricker personally, and sometimes involving large sums; the peculiar manner in which Ricker dealt with Ryan's account in the defendant bank, such as debiting it by ticket on April 17th with $2,250, which would have resulted in slight overdraft of Ryan's account, but which was placed to the credit of "C. G. Ricker, Vice President," and so held until July 1st, when it was retransferred to Ryan's account, then heavily overdrawn; the carrying for weeks of checks against the account as cash items without charging them to the account; crediting Ryan's account with $3,500 from a draft for that amount at a time when he was overdrawn more

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than $3,200; the carrying as a credit of the above draft from August 9th until October 4th, when it had been refused by the firm upon which it was originally drawn to cover cattle not then shipped, and when the amount was never received until shipment, almost two months later, to another commission firm; the acceptance by Ricker, for the defendant bank, of notes signed, as Ryan testified, some "in my own name and some made by me in my two given names"; notes made to defendant bank through Ricker by Ryan's 12-year old son and by his wife. Ryan claimed he did not know why Ricker had them make notes, or whether the proceeds were credited to him, though he paid his son's note, with the exception of $400.

The evidence referred to, and other on the same line, convince the court either that Ricker was using T. C. Ryan as a tool in working out his nefarious plans against both banks, or that Ricker and Ryan were operating together, in utter disregard of the welfare or safety of the two banks, if indeed they were not moved by a more sinister motive. In any event, Ricker was engaged in reprehensible, if not criminal, conduct toward one or both banks. It cannot be presumed that he would communicate such actions, or the knowledge of the acts of his tool or confederate, Ryan, to any one, much less to his employer, the defendant bank, or that he would use the information to benefit the defendant bank. Therefore his knowledge of Ryan's dealings with the mortgaged cattle cannot be imputed to the bank. Hence neither it nor its receiver can be held as trustee of any proceeds through such sale.

The judgment is affirmed.

(245 Fed. 297)

NORTH AMERICAN DREDGING CO. OF NEVADA et al. v. MINTZER et al.

(Circuit Court of Appeals, Ninth Circuit. October 1, 1917.)

No. 2913.

1. NAVIGABLE WATERS ⟹1(1)—WHAT CONSTITUTES "NAVIGABLE" STREAM.

A tract of marsh or tide lands largely submerged at flood tide was intersected by tidal sloughs, one of which was a mile, more or less, in length, and in its lower reaches as wide as 100 feet or more, with a depth of from 2 feet or less at low tide in its shallowest parts to approximately 7 or 8 feet at its flood, and deepening somewhat towards its mouth. It had never been used or regarded as navigable, other than for duck boats or punts for hunting or fishing, until within a few years, when an oil company established a plant on adjoining land, and on a few occasions took power boats and scows of light draft up the channel on the flood tide, and it was impracticable to put the channel to such use without deepening it for the purpose. *Held*, that the stream was not a "navigable" stream.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Navigable.]

2. NAVIGABLE WATERS ⟹37(7)—LANDS UNDER WATER—CONSTRUCTION OF GRANT.

Title to the soil underlying such channel was in those claiming under a grant from the state, whether or not the channel was navigable.

Appeal from the District Court of the United States for the Second Division of the Northern District of California; Wm. C. Van Fleet, Judge.

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Suit by Lucio M. Mintzer and another, as executors of William Mintzer, deceased, against the North American Dredging Company of Nevada and another. From an order 242 Fed. 553, granting an injunction, defendants appeal. Affirmed.

Earl D. White, of Oakland, Cal., and D. J. Hall, of Richmond, Cal., for appellants.

Edward J. McCutchen and John F. Cassell, both of San Francisco, Cal., for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. This is an appeal from an order in favor of plaintiffs below, appellees, Lucio M. Mintzer and Mauricia T. Mintzer, as executor and executrix of the estate of William Mintzer, deceased, granting injunction restraining defendant, appellant, North American Dredging Company of Nevada, from dredging and cutting a canal across property owned by them in the city of Richmond, Cal., and awarding damages. The bill alleged that complainant's testator at the time of his death was seised of certain described lands, and that about April 15, 1915, defendant trespassed by beginning to dredge a canal 80 feet in width and 8 feet in depth for a distance of from 4,000 to 5,000 feet across the land of testator. Defendant denied seisin or possession by plaintiffs, and alleged that the land described was a navigable waterway, with a public terminus connecting the city of Richmond with San Pablo and San Francisco Bays, and that at no time had plaintiffs or their testator had title to the land covered by the waters of the channel; that on the 15th of March, 1915, the defendant entered into a contract with the city of Richmond, wherein defendant agreed to dredge a channel through the south channel of San Pablo Canal, and that such work was commenced in April, 1915, for the purpose of improving the waterway in the interests of commerce and navigation. The city of Richmond intervened, and alleged the existence of a navigable channel within the limits of the city, and that the best interests of the city required the improvement of its navigability; permission to make such improvements having been received from the War Department of the United States. Plaintiffs denied the navigability or commercial character of the channel, and alleged that the intervener and the Standard Oil Company of California have entered into a contract whereby the city of Richmond would cause the soil dredged from the property of plaintiffs to be deposited upon the property of the Standard Oil Company, the latter agreeing to pay the city of Richmond therefor, and that if the channel is deepened in accordance with the contract between the intervener and defendant it will enable the Standard Oil Company to obtain a waterway to San Pablo Bay across the land and property of plaintiffs.

The turning point in the case is whether or not the waterway involved is navigable. It was the opinion of the District Court that it was not; that it never had been in fact navigable in any true sense, and has not been considered, either by the public or by the authorities of the state of California, as capable of navigation; and, furthermore, that the works sought to be prosecuted could not be carried on without ar-

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tificial aid. Before reaching this conclusion, and in order to get a better understanding of the evidence bearing upon the physical situation, the District Judge made a personal inspection of the lands and channel involved in the controversy, and with painstaking care has described the situation, substantially as follows:

[1] The channel involved is about a mile in length, running through a tract of salt marsh or tideland, comprising about 500 acres, with the northerly boundary on San Pablo Bay and extending southerly for a mile, more or less, between a natural waterway called San Pablo creek, which borders on the east, the "Potrero" constituting the San Pablo peninsula on the west. The land was acquired by plaintiffs' grandfather by grant from those holding under the state Tideland Act. It is subject to tide action, largely submerged at flood tide, and mostly exposed at its lower stages. It is intersected by tidal sloughs cut by the flux and recession of the waters of the bay in their diurnal flow, some of them of magnitude and others dwindling to rivulets; at high tide many of these sloughs have considerable water. and at low tide the mud bottom is practically exposed. The particular channel in controversy branches from a larger stream a short distance south from where the San Pablo creek debouches from the marsh land into San Pablo Bay, and thence it winds its way throughout the length of the tract of 500 acres. The channel varies in width and depth from 100 feet or over in its lower reaches, and narrowing farther south, with a depth varying with the tide from 2 feet or less at low tide in its shallowest parts toward the south to approximately 7 or 8 feet at its flood, and deepening as it flowes to its mouth enters the San Pablo Canal. When the predecessors of the plaintiff acquired these tidelands, and for years thereafter, there was no settlement in the immediate neighborhood; the lands being largely used for farming and grazing. Years ago plaintiffs' grandfather built a dike across the lands near the northern boundary to keep out the tide and render the land more available for pasturage. This dike, except for a tide gate, was built solidly across the channel involved herein, and was maintained up to 1901 in a way to restrain the influx of the tide and to make the lands more available for pasturage. To a great extent the dike has disappeared, but evidences of it now exist.

The San Pablo Canal has always been navigated to some extent, but the channel in controversy and other sloughs intersecting the land have never been used or regarded as available for any kind of navigation, other than for duck boats or punts for hunting and fishing. About 1900 the Santa Fé Railroad selected Point Richmond as a terminus on San Francisco Bay, and the city of Richmond began to grow. The city is described as built upon the high land southerly and westerly of the marsh lands in question; the high land extending northerly in a peninsula terminating in San Pablo Point, partly dividing the waters of San Pablo Bay from the Bay of San Francisco. The corporate limits of the city of Richmond have extended to include this body of tidelands, but the latter is unreclaimed and unimproved, except by the Standard Oil Company, which has a refining plant at Richmond. The site of the refining plant includes a portion of marsh land purchased

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from plaintiffs' testator from the southerly end of the tract hereinbefore described. When the plant was built, the slough or channel involved continued into the portion of the marsh acquired by the Oil Company, and somewhat recently the Oil Company has built a levee across the channel, and along the northern boundary of its marsh lands, and has filled in the channel where it crosses the lands of the company. North of the marsh land sold to the Standard Oil Company is a strip of land about 200 feet wide, sold by the predecessors of the plaintiff to the Belt Line Railroad. This narrow strip, running across the marsh between the lands of the Oil Company and the present holdings of the plaintiffs, forms the southerly boundary of the latter and the northerly boundary of the former.

The court found that it was only after the Oil Company had established its works that any effort was made to navigate the channel by craft or burden; that occasionally power boats and scows of light draft have been taken up through San Pablo creek into the channel involved, on the flood tide, but that it was impracticable to put the channel to such use without deepening it for the purpose. About 1915 an arrangement was made between the Oil Company and the city of Richmond, whereby the city agreed to pay the defendant to dredge the channel, and the Oil Company, in consideration of the removed soil being put on its land within its levee or bulkhead, agreed to pay the city for the material. Proceeding upon the theory that the channel was a public navigable waterway, a permit from the War Department of the United States was procured to enable the work to be prosecuted.

Upon these facts, which are supported by substantial evidence, the court was right in holding that the channel was not a navigable waterway. While any very exact rule cannot be stated, we find that the Court of Appeals for the Eighth Circuit, in Harrison v. Fite, 148 Fed. 781, 78 C. C. A. 447, has cited many cases to uphold the test it has expressed in this way:

"To meet the test of navigability as understood in the American law, a water course should be susceptible of use for purposes of commerce or possess a capacity for valuable floatage in the transportation to market of the products of the country through which it runs. It should be of practical usefulness to the public as a public highway in its natural state and without the aid of artificial means. A theoretical or potential navigability, or one that is temporary, precarious, and unprofitable, is not sufficient. While the navigable quality of a water course need not be continuous, yet it should continue long enough to be useful and valuable in transportation; and the fluctuations should come regularly with the seasons, so that the period of navigability may be depended upon. Mere depth of water, without profitable utility, will not render a water course navigable in the legal sense, so as to subject it to public servitude, nor will the fact that it is sufficient for pleasure boating or to enable hunters or fishermen to float their skiffs or canoes. To be navigable, a water course must have a useful capacity as a public highway of transportation. Toledo Liberal Shooting Co. v. Erie Shooting Club, 33 C. C. A. 233, 90 Fed. 680; Moore v. Sanborne, 2 Mich, 520, 524, 59 Am. Dec. 209; Morgan v. King, 35 N. Y. 454, 458, 91 Am. Dec. 58; Brown v. Chadbourne, 31 Me. 9, 1 Am. Rep. 641 [50 Am. Dec. 641]; Griffith v. Holman, 23 Wash. 347, 63 Pac. 339 [83 Am. St. Rep. 821]; Wethersfield v. Humphrey, 20 Conn. 218; Rowe v. Granite Bridge, 38 Mass. [21 Pick.] 344; Gaston v. Mace, 33 W. Va. 14, 10 S. E. 60, 5 L. R. A. 392, 25 Am. St. Rep. 848; Neaderhouser v. State, 28 Ind. 257; Rhodes v. Otis, 33 Ala. 578, 73 Am. Dec. 439; Railroad v. Brooks, 39 Ark. 403, 43 Am. Rep. 277."

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Chisholm v. Caines (C. C.) 67 Fed. 285, cited by appellants, does not conflict with the quotation from Harrison v. Fite, supra.

We need not go into a discussion of the differences in the testimony of the witnesses. It is fair to say that there were some disagreements between them, particularly in respect to the capacity of the waterway, but, as already said, we accept the conclusions of the lower court as to the facts. Estep v. Kentland Coal & Coke Co., 239 Fed. 617, 152 C. C. A. 451; Ebner Gold Mining Co. v. Alaska Juneau G. M. Co., 210 Fed. 599, 127 C. C. A. 235.

[2] The question of title of the lands, including the soil underlying the channel itself, was clearly correctly decided upon the authority of Knudson v. Kearney, 171 Cal. 250, 152 Pac. 541.

Affirmed.

(245 Fed. 301)

PUGET SOUND TRACTION, LIGHT & POWER CO. v. FRESCOLN

(Circuit Court of Appeals, Ninth Circuit. October 1, 1917.)

No. 2887.

DEATH ⟹27—ACTIONS FOR DEATH—DEFENSES—FORMER RECOVERY.

Rem. & Bal. Code Wash. § 183, provides that, when death is caused by wrongful act or neglect, the heirs or personal representatives may maintain an action for damages, and that, if deceased leave no widow or issue, his dependent parents, sisters, or minor brothers resident within the United States may maintain the action. Section 194 provides that no action for personal injury to any person occasioning his death shall abate, nor shall the right of action determine by reason of such death, if he have a wife or child or dependent parents, sisters, or minor brothers, but that the action may be prosecuted or commenced in their favor. *Held* that, where the plaintiff in an action for injuries died from the injuries before trial, and his widow, as administratrix and in her own right, was substituted as plaintiff and prosecuted the action to judgment, the judgment did not bar an action by her for damages from the death, as under the Washington decisions she could not have recovered damages for the death in the first action and, though there was but one negligent act, it gave rise to two wrongs, one against the injured man's estate, and the other against his dependent relatives.

In Error to the District Court of the United States for the Northern Division of the Western District of Washington; Jeremiah Neterer, Judge.

Action by Anna F. Frescoln against the Puget Sound Traction, Light & Power Company. Judgment for plaintiff, and defendant brings error. Affirmed.

See, also, 225 Fed. 441.

J. W. Frescoln brought action in the superior court of Kings county, Wash., against Puget Sound Traction, Light & Power Company, plaintiff in error here, to be called defendant, for $5,323 damages for injuries received while alighting from a car owned by the defendant. Upon issues framed trial was set for October 13, 1914, but on September 15, 1914, the injured man died. Thereafter, in November, 1914, the widow, Anna F. Frescoln, defendant in error here, to be called plaintiff as administratrix and in her own right, was substituted as plaintiff, and individually and as administratrix of the estate of J. W. Frescoln filed a supplemental complaint, alleging the matters set forth in the original complaint, and also the death of Mr. Frescoln, and asked judg-

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ment for $20,613. Upon trial a verdict for $2,500 for the plaintiff was rendered, but the state court granted motion for judgment in favor of the defendant notwithstanding the verdict. Thereafter Mrs. Frescoln appealed to the Supreme Court of the state, and that court reversed the judgment of the superior court and directed judgment upon the verdict, and on April 15, 1916, judgment was accordingly entered. Before the appeal just referred to, Mrs. Frescoln, as the widow of Mr. Frescoln, on May 11, 1915, brought this present action in the superior court of the state, asking $25,000 damages for the death of her husband, J. W. Frescoln. In due course the action was removed to the federal court, where the defendant answered, pleading the former action for damages instituted by J. W. Frescoln in his lifetime and the judgment secured therein by Mrs. Frescoln. At the time of the filing of such answer the appeal above referred to had not been decided by the Supreme Court. Anna Frescoln, plaintiff herein, moved to strike out the affirmative defense, but the lower court denied the motion. 225 Fed. 441. Afterward, when the Supreme Court of the state had reversed the judgment of the lower court in the original action brought by Frescoln, and after the judgment on the verdict was entered in accordance with the ruling of the Supreme Court, plaintiff herein, Anna F. Frescoln, filed an amended reply herein, admitting the institution of the action by Mr. Frescoln, but setting up the appeal, the reversal of the judgment by the Supreme Court, the entry of judgment upon the verdict, and praying judgment upon the pleadings. When the case came to trial, before the introduction of evidence, defendant moved for judgment upon the pleadings, upon the ground that the deceased had instituted an action for the personal injuries he received during his life, which action, after his death, had been revived and prosecuted to judgment by the plaintiff, Anna F. Frescoln. The court denied the motion, and upon trial verdict was rendered for the plaintiff, Anna F. Frescoln, for $4,500, and thereafter judgment was entered on the verdict. By writ of error the defendant brings the case to this court.

James B. Howe and H. S. Elliott, both of Seattle, Wash., for plaintiff in error.

Thomas H. Bain, of Seattle, Wash., for defendant in error.

Before GILBERT and HUNT, Circuit Judges, and WOLVERTON, District Judge.

HUNT, Circuit Judge (after stating the facts as above). From the foregoing statement the question for decision is whether, under the statutes of Washington, where one receives personal injuries as the result of the negligence of another and during his life begins an action to recover therefor, but before trial dies as a result of the injuries inflicted, and his widow, as administratrix and in her own right, revives and carries on such action for personal injuries to judgment, an independent action for wrongful death will lie in favor of the widow. The statutes of the state which have to do with the matter are as follows (Remington & Ballinger's Codes, vol. 1):

"Sec. 183. (4828.) * * * When the death of a person is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death. If the deceased leave no widow or issue, then his parents, sisters or minor brothers who may be dependent upon him for support and who are resident within the United States at the time of his death, may maintain said action. * * * In every such action the jury may give such damages, as under all circumstances of the case may to them seem just.

"Sec. 194. (4838.) No action for a personal injury to any person occasioning his death shall abate, nor shall such right of action determine, by reason of such death, if he have a wife or child living, or leaving no wife or issue, if he have dependent upon him for support and resident within the United States

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at the time of his death, parents, sisters or minor brothers; but such action may be prosecuted, or commenced and prosecuted, in favor of such wife or in favor of the wife and children, or if no wife, in favor of such child or children, or if no wife or child or children, then in favor of his parents, sisters or minor brothers who may be dependent upon him for support, and resident in the United States at the time of his death."

Defendant's contention is that under the statutes quoted the beneficiaries are the same, and that the same parties plaintiff are not entitled to recover for the same wrongful act, and that to permit two recoveries would be to permit double damages to be assessed against the wrongdoer, in that it would permit a recovery of the full amount of damages sustained by the deceased, and then a second recovery by the same individuals for the damages resulting to them from the death of the deceased. In their argument counsel for the defendant say that in the states where two concurrent actions are permitted they are maintained in two different and distinct rights, in that the action under the survival statute is brought by the personal representative for the benefit of the estate of the deceased, while the action under the death statute is brought by or for the benefit of the heirs expressly mentioned in the various death statutes; and further that, inasmuch as there is no provision in the state of Washington whereby the one statute makes the estate of the deceased the beneficiaries and the other certain heirs the beneficiary, there is a vital distinction between the statutes of Washington and those of states where two concurrent actions are allowed.

In support of its position defendant cites, among other cases, Riggs v. Northern Pacific Railway, 60 Wash. 292, 111 Pac. 162, and Longfellow v. Seattle, 76 Wash. 509, 136 Pac. 855. But an examination of these decisions shows that in the former the court went no further than to hold that the beneficiaries under the death act of the state of Washington could not split their actions, and in the latter that the statutes, so far as they coincided, meant to afford separate and coexistent remedies, permitting one recovery for the one death rather than cumulative recoveries. Clearly, therefore, they are not decisive of the point involved in the present case, for here there has been no attempt to make two recoveries for one wrong. It is true there has been but one negligent act; but that negligent act has given rise to two wrongs, one against the estate of the injured man, the other against his dependent relatives. In the survivor case all the heirs of the deceased are beneficiaries of the verdict; while under the death statute only dependent relatives may be beneficiaries of the recovery. In the first action, prosecuted to judgment by Mrs. Frescoln, she could not have recovered damages for the death of her husband. This rule was laid down by the Supreme Court of Washington in Thompson v. Seattle, R. & S. R. Co., 71 Wash. 443, 128 Pac. 1070, where the court affirmed an instruction to the jury that, in an action prosecuted for damages arising out of injuries resulting from negligence, the jury could award nothing for the death of the injured person, and nothing for the loss caused by reason of the death of such a person. This case refutes the argument that there is a vital distinction between the statutes of Washington and other states permitting concurrent actions.

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In Swanson v. Pacific Shipping Co., 60 Wash. 87, 110 Pac. 795, sections 183 and 194, hereinbefore quoted, were considered by the Supreme Court, and it was held that each of the sections was intended to serve its separate purpose, and must be so construed as to secure that result. Hedrick v. Ilwaco R. & N. Co., 4 Wash. 400, 30 Pac. 714. This court also has discussed the general question, and in Northern Pacific Railway Co. v. Adams, 116 Fed. 324, 54 C. C. A. 196, on writ of error to the Circuit Court for the District of Washington, held that under the statutes heretofore quoted there was a right of action in favor of the heirs or personal representatives of a person whose death was caused by the negligence of another to recover such damages as might be just, as a new and separate cause of action for damages for the loss sustained by such beneficiaries, and that such right was not dependent upon the right of the deceased to maintain an action for the act which caused his death had he survived. The decision in that case was reversed (in Northern Pacific Railway Co. v. Adams, 192 U. S. 440, 24 Sup. Ct. 408, 48 L. Ed. 513), but there was no intimation that the view of this court as to the rights of action was not correct.

In Railroad Co. v. Dickson, 179 U. S. 131, 21 Sup. Ct. 67, 45 L. Ed. 121, the court discussed section 241 of the Constitution of Kentucky, which provides that, "whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death, from the corporations and persons so causing the same," and section 6 of the Kentucky Statutes, which provides that, "whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death from the person or persons, company or companies, corporation or corporations, their agents or servants, causing the same; and when the act is willful or the negligence is gross, punitive damages may be recovered, and the action to recover such damages shall be prosecuted by the personal representative of the deceased," and held that the cause of action thus created was independent of any right of action the deceased might have had or would have had if he had survived the injury. In Brodie v. Washington Water Power Co., 92 Wash. 574, 159 Pac. 791, the court said:

> "The statutes were enacted to overcome defects thought to exist in the common law. By the common law no person had the right to recover for the death of another, no matter how wrongfully or negligently caused, and the right of action possessed by a person injured did not survive his own life. The first section of the statute cited is plainly a survival statute. Its purpose is to preserve in the beneficiaries named therein such right of action as the injured person himself had because of the wrongful or negligent act causing the injury, and is confined to such personal loss as the injured person sustained. The second, although originating in the same wrongful act or neglect, begins where the other ends and is confined to such loss and damage as the beneficiaries named have suffered by the death of the person injured. Swanson v. Pacific Shipping Co., 60 Wash. 87, 110 Pac. 795; Thompson v. Seattle, Renton & S. R. Co., 71 Wash. 436, 128 Pac. 1070."

Our conclusion is that under the interpretations of the laws of the state the question is settled and that the judgment of the District Court was correct.

Affirmed.

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(245 Fed. 305)

NG CHOY FONG v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 1, 1917.)

No. 2864.

1. CONSTITUTIONAL LAW ⟹266—POISONS ⟹2—DUE PROCESS—PRESUMPTION OF INNOCENCE.

Act Cong. Feb. 9, 1909, c. 100, 35 Stat. 614, as amended by Act Jan. 17, 1914, c. 9, 38 Stat. 275, providing in section 2 (Comp. St. 1916, § 8801) that, if any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any opium, or derivative thereof, contrary to law, or shall receive, conceal, buy, sell, or in any manner facilitate the transportation or concealment of, such opium, knowing the same to have been imported contrary to law, shall be punished, and that whenever, on trial for a violation, the defendant is shown to have had possession of such opium, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant shall explain the possession to the satisfaction of the jury, and in section 3 (Comp. St. 1916, § 8801a) that on or after July 1, 1913, all smoking opium or opium prepared for smoking found in the United States shall be presumed to have been imported after the 1st day of April, 1909, on which date the importation of opium, save for medicinal purposes, etc., was forbidden, and that the burden of proof shall be on the accused to rebut the presumption, is not invalid, as violating Const. Amend. 5, declaring that no person shall be compelled in any criminal case to be a witness against himself, for the statute did not do away with the presumption of innocence, or require accused to take the stand, but merely declared a rule of evidence; the presumption declared not rebutting the inference of innocence.

2. CRIMINAL LAW ⟹789(4)—TRIAL—INSTRUCTIONS—REASONABLE DOUBT.

In a prosecution for violating Act Cong. Feb. 9, 1909, c. 100, as amended by Act Jan. 17, 1914, c. 9, §§ 2, 3, by concealing and facilitating the transportation and concealment of opium, where the court charged that accused was presumed to be innocent, and that such presumption continued to operate in her favor until overcome by evidence establishing her guilt beyond a reasonable doubt, but that such presumption should be considered with the statute declaring that possession of opium should be deemed to make out a prima facie case, etc., the instructions were not misleading, and could not have led the jury to believe that accused should be convicted without proof of guilt beyond a reasonable doubt.

In Error to the District Court of the United States for the First Division of the Northern District of California; Maurice T. Dooling, Judge.

Ng Choy Fong was convicted of violating Act Cong. Feb. 9, 1909, c. 100, as amended by Act Jan. 17, 1914, c. 9, by having concealed and facilitated the transportation and concealment of opium prepared for smoking purposes, and which she knew was imported into the United States contrary to law, and she brings error. Affirmed.

George J. Hatfield, of San Francisco, Cal., for plaintiff in error.

John W. Preston, U. S. Atty., and M. A. Thomas, Asst. U. S. Atty., both of San Francisco, Cal.

Before GILBERT and HUNT, Circuit Judges, and WOLVERTON, District Judge.

HUNT, Circuit Judge. Plaintiff in error, a Chinese woman, was convicted of violation of the act of Congress of February 9, 1909, as

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amended January 17, 1914, in having on August 12, 1915, concealed and facilitated the transportation and concealment of 660 five-tael cans of opium prepared for smoking purposes, which she well knew had been imported into the United States contrary to law. Under the writ of error she assails the constitutionality of the portions of sections 2 and 3 of the act of February 9, 1909, which provide that on and after July 1, 1913, all smoking opium found within the United States shall be presumed to have been imported after April 1, 1909, and that possession of such opium shall be deemed sufficient evidence to authorize conviction, unless the defendant shall explain the possession to the satisfaction of the jury. We quote the material parts of the sections:

"That after the first day of April, nineteen hundred and nine, it shall be unlawful to import into the United States opium in any form or any preparation or derivative thereof: Provided," etc.

Sec. 2: "That if any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any opium or any preparation or derivative thereof contrary to law, or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such opium or preparation or derivative thereof after importation, knowing the same to have been imported contrary to law, such opium or preparation or derivative thereof shall be forfeited and shall be destroyed, and the offender shall be" punished, as provided. "Whenever, on trial for a violation of this section, the defendant is shown to have, or to have had possession of such opium or preparation or derivative thereof, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain the possession to the satisfaction of the jury."

Sec. 3: "That on and after July first, nineteen hundred and thirteen, all smoking opium or opium prepared for smoking found within the United States shall be presumed to have been imported after the first day of April, nineteen hundred and nine, and the burden of proof shall be on the claimant or the accused to rebut such presumption."

[1] The position taken is that the provisions referred to are in conflict with article 5 of the Amendments to the Constitution, in that they take away from a defendant the protection of the presumption of innocence, and that they "tend to compel the defendant to take the witness stand," whether or not she wishes to, at the peril of being convicted of a crime not proved against her. The question is presented by objection to the following instructions given by the lower court to the jury:

"These provisions are made a part of the law because of the difficulty of proving guilty knowledge, and render it necessary only that the government prove that the defendants had, after July 1, 1913, smoking opium in their possession, when the presumption at once arises that it had been imported after April 1, 1909, and such possession imputes to the defendants a guilty knowledge sufficient to warrant a conviction unless the defendants shall explain such possession to your satisfaction. If, therefore, you are satisfied from the evidence beyond a reasonable doubt that defendants did have possession of this opium, and that it was smoking opium, then such possession will be sufficient to warrant a conviction, unless the defendants have explained such possession to your satisfaction."

Examination of section 1 of the act above quoted (Comp. St. 1916, § 8800) shows that it is a general prohibition against importing opium after April 1, 1909, except for use in certain purposes not here relevant. Section 2 is a declaration that it is unlawful for any person to

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conceal or facilitate the concealment of opium which has been unlawfully imported, knowing it has been imported contrary to law. These are the substantive commands of the law with relation to the opium. But, in order to make the law as effective as might be, Congress, in its wisdom, meant to facilitate the practical administration of the statute by establishing these rules: (1) That if, upon trial, a person is shown to have had opium illegally imported in his possession, such possession shall be deemed enough evidence to authorize conviction unless such possessor shall explain the possession to the satisfaction of the jury. (2) That after July 1, 1913, all opium found shall be presumed to have been imported since April 1, 1909, and the accused must take it upon himself to rebut this presumption.

There can be no doubt of the general power and authority of Congress to create a rule changing the burden of proceeding in a criminal case, by providing that upon the production of certain facts it shall rest upon the defendant, and also to establish a rule of evidence making proof of one fact prima facie evidence of another related thereto. We must, of course, keep it in mind that the statute under examination has not attempted to make a rule that any inference or presumption of fact shall be conclusive at law. Wigmore on Evidence, § 1354. The statute has laid down a rule, not of substantive law at all, but merely of evidence. It does not in any way conclusively shut out all evidence from defendant; it has declared that, a prima facie case being made, the duty of producing evidence to avoid the effect of such prima facie case is upon the defendant. The great weight of authority confirms our belief that such a law is in no way in excess of power. Ogden v. Saunders, 12 Wheat. 213, 6 L. Ed. 606; Morgan v. State, 117 Ind. 569, 19 N. E. 154; Voght v. State, 124 Ind. 358, 24 N. E. 680; Com. v. Smith, 166 Mass. 370, 44 N. E. 503; Board v. Merchant, 103 N. Y. 143, 8 N. E. 484, 57 Am. St. Rep. 705; People v. Cannon, 139 N. Y. 32, 34 N. E. 759, 36 Am. St. Rep. 668; State v. Higgins, 13 R. I. 330, 43 Am. Rep. 26 note.

[2] The court in its instructions expressly told the jury that defendant was presumed to be innocent, and that such presumption continued to operate in defendant's favor until it was overcome by evidence establishing guilt beyond a reasonable doubt, but that the presumption of innocence must be considered in connection with the statutory inferences read to the jury, and that the prosecution must establish every element of the crime charged beyond a reasonable doubt. These several instructions made no conflict with respect to the inferences from the evidence in the case. The jury, in effect, were told that the possession of the opium, if a fact, was enough to authorize conviction, unless the defendant went forward with evidence which accounted for such possession; and again, that the inference or presumption to be drawn was that the opium found was imported after a certain date unless the defendant went forward and overcame such inference. Thus, the duty of production of evidence could not have been misunderstood, while upon the whole case it was for the prosecution to establish guilt beyond a reasonable doubt. Wilson v. U. S., 162 U. S. 613, 16 Sup. Ct. 895, 40 L. Ed. 1090; Agnew v. U. S., 165 U. S. 36, 17 Sup. Ct.

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235, 41 L. Ed. 624; Dunlop v. U. S., 165 U. S. 486, 502, 17 Sup. Ct. 375, 41 L. Ed. 799; Greenleaf on Evidence (16th Ed.) §§ 32, 33, 34.

The position of defendant at the close of the evidence for the prosecution was like that of any other defendant against whom a prima facie case is made. She could elect whether or not she would proceed, or stand upon her plea as against the evidence of the government. She chose to proceed; and, having failed to satisfy us that the verdict of guilty is violative of any of her rights, she must abide the result of the trial.

The judgment is affirmed.

(245 Fed. 308)

GIN DOCK SUE v. UNITED STATES. *

(Circuit Court of Appeals, Ninth Circuit. October 1, 1917.)

No. 2858.

1. ALIENS ⚷32(12)—DEPORTATION OF CHINESE—REVIEW OF PROCEEDINGS.

A Chinese person's application for admission to the United States as a returning Chinese merchant was denied by the Commissioner of Immigration. An appeal to the Secretary of Labor was dismissed, and pending an application for reopening the case, he escaped from detention. *Held* that, on a subsequent proceeding for deportation, the mercantile status of the Chinese person could not be inquired into, having been determined by the judgment of the immigration officials, and not being open to review, unless the proceedings were unfair.

2. ALIENS ⚷31—CHINESE PERSONS—PROCEEDINGS FOR DEPORTATION.

Where a Chinese person, applying for admission to the country as a returning merchant, escaped from detention pending a petition to reopen his case, his application having been denied and admission refused, he may, though by reason of his escape he continued in the country for more than three years, be thereafter deported under Immigration Act Feb. 20, 1907, c. 1134, § 21, 34 Stat. 905 (Comp. St. 1916, § 4270); for though an alien, who has violated no law, except that he is in the country through an irregular entry, cannot after three years' residence be deported, unless charged with immorality, etc., the order denying such Chinese person's application for admission stood as a judgment requiring deportation throughout the period of his entire residence.

3. ALIENS ⚷23(1)—DEPORTATION OF CHINESE PERSONS—DEFENSES.

That a Chinese person sought to be deported was a merchant did not entitle him to remain, where his status as such was acquired subsequent to his entry into the country surreptitiously, by escaping from detention quarters after he had been denied permission to land.

4. ALIENS ⚷23(1)—DEPORTATION OF CHINESE PERSONS—DEFENSES.

A Chinese person, who resided in the United States for over six years, carrying on the business of a merchant, does not, by reason of his connection with an association of Chinese attached to the Chinese consulate, fall within the exemption of Act May 6, 1882, c. 126, § 13, 22 Stat. 61, as amended by Act July 5, 1884, c. 220, 23 Stat. 118 (Comp. St. 1916, § 4300), declaring that exclusion provisions shall not apply to diplomatic and other officers of the Chinese or other governments traveling upon the business of that government.

5. ALIENS ⚷23(1)—DEPORTATION OF CHINESE—ATTENDANT OF CONSUL.

A Chinese person, who became secretary of an association of Chinese persons attached to the Chinese consulate, who had no credentials from his government or passport from the minister at Washington, is not an

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*Rehearing denied January 7, 1918.

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attendant of a consular officer, within Act Sept. 13, 1888, c. 1015, § 14, 25 Stat. 479 (Comp. St. 1916, § 4314), exempting Chinese diplomatic or consular officers and their attendants from provisions for the deportation of Chinese persons, though such Chinese person did some work for the consul and was a member of an advisory board; the association being benevolent in its nature and composed of Chinese from a particular province.

Appeal from the District Court of the United States for the First Division of the Northern District of California; Maurice T. Dooling, Judge.

Deportation proceedings by the United States against Gin Dock Sue. Deportation was directed by the commissioner, and a like order (230 Fed. 657) being entered, on appeal to the District Court, defendant appeals. Affirmed.

From the stipulation of counsel, the following facts are gleaned: Appellant departed from the United States for China July 9, 1907. He returned July 14, 1908, and, under the name of Yeung Lung Soo, applied for admission as a returning Chinese merchant. His admission was denied by the commissioner of immigration at the port of San Francisco August 26, 1908. An appeal was taken from the commissioner's decision, which was dismissed by the honorable Secretary of Labor October 1, 1908. An application was made for a reopening of the case November 4, 1908, but on November 28, 1908, appellant escaped from his place of detention, and on December 8, 1908, the commissioner of immigration denied the application because of the fact that appellant had escaped from the place where detained and was a fugitive.

The present proceeding was instituted before a United States commissioner, by complaint of an immigration inspector, seeking the appellant's deportation on the ground that he was then illegally within the United States. The commissioner ordered him to be deported, and on appeal to the District Court a like order was made and entered. The case is now here on appeal from the judgment of the District Court.

George A. McGowan, of San Francisco, Cal., for appellant.

John W. Preston, U. S. Atty., and Casper A. Ornbaun, Asst. U. S. Atty., both of San Francisco, Cal.

Before GILBERT and HUNT, Circuit Judges, and WOLVERTON, District Judge.

WOLVERTON, District Judge (after stating the facts as above). Three contentions are made opposing appellant's deportation: First, that he is a Chinese official, and on that account may not be excluded; second, that he has been engaged in business in California as a Chinese merchant for the past 6½ years, and for that reason may not be excluded, although ordered deported for a prior irregular re-entry; and, third, that the court has jurisdiction, and should now inquire into the mercantile status of appellant for the year prior to his departure from the United States, it being claimed that his status was that of a merchant, and for that reason that he should not now be deported. We will consider these in their inverse order.

[1] The obstacle in the way of our inquiry into the mercantile status of the appellant for the year prior to his departure from the United States is that the decision, order, and judgment of the commissioner of immigration are final, and a bar thereto, and preclude further action by the courts, unless the appellant has not been accorded a fair hearing;

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and the fairness of his treatment at such hearing is not a matter of controversy here. His appeal to the Secretary of Labor was dismissed, which put an end to the inquiry, unless his case was reopened for further hearing. An attempt was made to reopen it, but was defeated by the appellant's act in escaping from his place of detention. The crucial question here is whether appellant shall be deported in pursuance of the order and judgment of the commissioner of immigration. Whatever his status at that time, that judgment has settled that it was not such as to entitle him to a re-entry into the United States, and by this the court is precluded from entertaining further inquiry, except, as we have indicated, upon complaint that he was not accorded a fair hearing before the commissioner. Chin Yow v. United States, 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369.

[2] It is urged in support of the second contention that, appellant having remained within the United States for the period of three years, he cannot now be deported, although his entry was irregular—this for two reasons, namely: (1) That he was not proceeded against within 3 years, in pursuance of section 21 of the general act to regulate the immigration of aliens into the United States; and (2) that his status has been that of a merchant in the meantime—indeed, it is said, for 6½ years prior to the present hearing.

It is quite true that an alien may not be deported after 3 years' residence, who has violated no law except that he is here through an irregular entry, if he is not otherwise chargeable with personal immorality. United States v. Wong You, 223 U. S. 67, 32 Sup. Ct. 195, 56 L. Ed. 354. In the present case, however, the appellant has been proceeded against within the 3 years. He was, in fact, proceeded against instantly upon his attempt to effect a re-entry, and his right to re-enter was adjudged adversely to his contention. The 3 years have elapsed with this order and judgment standing against him, neither reversed nor annulled. In other words, the judgment in the meanwhile has been in effect declarative of his unlawful status, as being within the country surreptitiously.

[3] This brings us to the inquiry whether, notwithstanding the order and judgment that he was without the right or privilege of re-entry, his remaining within the United States surreptitiously for more than three years, with the status of a merchant, cures his unlawful entry. In Tsoi Sim v. United States, 116 Fed. 920, 54 C. C. A. 154, which involved the right to remain in the United States of a Chinese woman who lawfully entered before the Chinese Exclusion Act was enacted, and remained there afterwards, but failed to register as required, and was thereafter lawfully married to a citizen of the United States, it was held that, by reason of her marriage, appellant took the status of her husband, and was not subject to deportation; the court assuming that she was subject to deportation previous to her marriage. So it was held, respecting a French woman, who, pending proceedings for her deportation under the immigration laws, married a citizen of the United States, that, by reason of having taken the status of her husband, she was entitled to remain. Hopkins v. Fachant, 130 Fed. 839, 65 C. C. A. 1.

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In Ex parte Ow Guen (D. C.) 148 Fed. 926, the relator, a Chinaman, was a resident of this country before the adoption of the Chinese Exclusion Act. He went to China, leaving the affidavits of two white witnesses showing him to be a merchant in Lowell. On his return he was refused admission because, although a merchant in fact, he was said not to be in law, as he had been a laborer and remained unregistered. He came again, and applied for admission as a merchant, but was ordered deported, because he had been an unregistered laborer. The court held that the relator, as an unregistered laborer, was entitled to all the rights of a resident alien until proceeded against and deported—among others, the right to become a merchant, and that, when he became a merchant, he had all the rights of one under the law. This was not a case of curing an unlawful entry by becoming a merchant. It was merely a case in the end where, a Chinaman having applied to enter as a merchant, and having been denied entry on the ground that he had been formerly within the United States with the status of a laborer, it was declared that he had the right to change his status, and, having done so, in pursuance thereof had the right of re-entry as a merchant.

These cases are not controlling here. If appellant's re-entry had been surreptitious only, the case would be different. He came and applied for re-entry, and was adjudged not to be entitled thereto. After the judgment had gone against him, he escaped, and remained in the country in spite of the efforts to deport him in pursuance of the order and judgment of the commissioner of immigration. It does not seem to us that an unlawful resistance of a lawful order and judgment, however long continued, can have the effect to outlaw such order and judgment. It is not through the neglect of the government that the order has not been executed, but through the adroitness of appellant in keeping himself secreted. We think, therefore, that, while appellant's long residence in this country might have cured a merely surreptitious entry, it does not cure an unlawful resistance of the judgment and order of deportation. To hold otherwise would be to encourage resistance to lawful authority.

[4, 5] The next inquiry is whether appellant is a Chinese officer within the exempted class. Section 13 of the act of May 6, 1882, as amended July 5, 1884 (23 Stat. 118), provides that the act "shall not apply to diplomatic and other officers of the Chinese or other governments traveling upon the business of that government"; and section 14 of the act of September 13, 1888 (25 Stat. 479), further provides "that the preceding sections shall not apply to Chinese diplomatic or consular officers or their attendants." The appellant clearly does not bring himself within the provision of section 13 of the earlier act. He is not in any sense an officer traveling upon the business of his government. Nor is he a diplomatic or consular officer within the meaning of section 14 of the act of 1888. Can he be said to be an attendant of such an officer, admitted to the United States under special instructions of the Department of Commerce and Labor?

K. Ow Yang, the Chinese consul general for the port of San Francisco, testifies that appellant is secretary of the Ning Yung Association,

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and attached to the Chinese consulate, and that he has been so attached since last November (1913); that he was selected by the Ning Yung Association, and that all the members of the different associations assist in the consular work; that all the presidents of such associations come from China, but that the secretary is usually selected in this country on account of his knowledge of English. The appellant has no credentials from his government, nor a passport from the minister at Washington. He simply is secretary of an association, who may do some work for the Chinese consul if he sees fit to call upon him for that purpose, and a member of the advisory board of the consul. It further appears that the Ning Yung Association is composed of all the Chinese living in this country who come from Ning Yung province in China, and that the work of the association is benevolent in character. This testimony shows the appellant to be an officer of the Ning Yung Association—an association organized in this country; not an association even of the Chinese government, nor organized by its authority. By reason of his being such an officer, the Chinese consul avails himself of his assistance in doing consular work; but we infer that he is not a regular attendant of the consul, any more than are the secretaries of all the six associations of Chinese residents in this country similarly organized, who may be members of an advisory board of the consulate. This, as we are impressed, does not constitute the appellant an attendant of the consular office of the Chinese government, within the meaning of section 14 of the act of Congress of September 13, 1888. But, even if he had become an attendant by reason of his selection by the Ning Yung Association as secretary, we think that would not avail to cure his unlawful resistance to deportation under the order and judgment of the commissioner of immigration. Nor do we think that the treaty relations between this government and China help his case.

Affirmed.

(245 Fed. 312)

AMERICAN BANK OF ALASKA v. JOHNSON.

(Circuit Court of Appeals, Ninth Circuit. October 1, 1917.)

No. 2815.

1. BANKRUPTCY ⟹303(3)—TRANSFERS—KNOWLEDGE OF TRANSFEREE—EVIDENCE.

In a suit by the trustee of bankrupts, composing a mining copartnership, to recover the value of gold dust delivered by the bankrupts to defendant bank, evidence *held* to show that the dust was sold to the bank in the ordinary course of business, that its value was at once ascertained and credited by tellers' slips to the account of the bankrupts, who were doing business as a partnership, and at once offset against their notes and debts, and that the bank had no knowledge at that time that the firm was insolvent, or that an unlawful preference would be given.

2. BANKRUPTCY ⟹164—PREFERENCES—DEPOSITS—EFFECT OF.

The deposit of gold dust in a bank to the account of the depositor is not a transfer of money as a payment or security, and does not operate to diminish the estate of the depositor.

3. BANKRUPTCY ⟹326—PREFERENCES—WHAT CONSTITUTE.

Where a depositor, who was indebted to a bank, make a deposit in the usual course of business, the bank's application of the amount of the de-

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posit to its indebtedness is valid as a set-off, under Bankruptcy Act July 1, 1898, c. 541, § 68a, 30 Stat. 565 (Comp. St. 1916, § 9652), and is not a preference under section 60a (section 9644).

4. BANKRUPTCY ⟹326—DEPOSIT AND CREDIT—CHARACTER OF TRANSACTION.
That the books of a bank did not show the entry of credit until the day after a deposit of gold dust does not change the character of the transaction, where at the time of the delivery of the dust to the bank credit was actually given by tellers' slips.

In Error to the District Court of the United States for the Fourth Division of the Territory of Alaska; Charles E. Bunnell, Judge.

Action by G. Johnson, as trustee in bankruptcy of T. Mitchell & Co., a mining copartnership consisting of Thomas Mitchell, Jas. J. Fallon, and Herman Fawcett, bankrupts, against the American Bank of Alaska, a corporation. There was a judgment for plaintiff, and defendant brings error. Reversed and remanded, with directions.

Action by Johnson, as trustee in bankruptcy of the mining partnership of T. Mitchell & Co., of Fairbanks, Alaska, against the American Bank of Alaska, at Fairbanks, to recover $3,750.27, with interest, upon the theory that the action of the bank with respect to certain gold dust, of the value of $3,750.27, delivered to the bank on the evening of July 31, 1913, constituted an unlawful preference, and was voidable under section 60 of the Bankruptcy Act. The case was tried to a jury, and general verdict for the trustee was rendered. Judgment in accord with the general verdict was entered, and the bank sued out writ of error.

Thomas A. McGowan, John A. Clark, and John Knox Brown, all of Fairbanks, Alaska, and Charles J. Heggerty and Knight & Heggerty, all of San Francisco, Cal., for plaintiff in error.

Herman Weinberger, of San Francisco, Cal., and Louis K. Pratt and Thomas A. Marquam, both of Fairbanks, Alaska, for defendant in error.

Before GILBERT and HUNT, Circuit Judges, and WOLVERTON, District Judge.

HUNT, Circuit Judge (after stating the facts as above). There is little conflict in the testimony, and the facts are substantially as follows: Mitchell & Co., a partnership, consisting of Thomas Mitchell, J. J. Fallon, and H. Fawcett, had an account with the bank for some weeks before July 31, 1913. By June 9, 1913, the firm owed about $1,500, besides a debt of about $400 to the bank. The first clean-up, on July 3, 1913, amounted to $1,904. This was turned into the bank, where the overdraft was then $1,400, and was credited to the firm. Checks were drawn against it, and again overdraft was made. The second clean-up, on July 16th, realized $2,280, and was also put in the bank to the credit of the firm, and checks were honored. The third clean-up was on July 30th, and was made subsequent to a telephone message from Brunning, cashier of the bank, advising the firm that it had no money and that notes and overdrafts were due, and that he (Brunning) had deposited his note for $500 to meet checks to reduce the overdraft. On the evening of July 31st, about 5 o'clock, after regular banking hours, Fallon, who had charge of the books and accounts,

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went to the bank with gold dust worth $3,750.14. The firm then owed over $13,000, of which it owed the bank, on notes and overdraft $4,096.14; the debt being for labor account checks, merchandise, and other things paid for by the bank between July 16th and 31st.

Fallon, in testifying as to the occurrences in the bank, said that he and Fawcett went to the bank about 5 o'clock and left the firm bank book and the gold dust, which was "to be blown and credited the same as before"; that he went back in the evening, between 7 and 8 o'clock, and was told that the dust was not cleaned up, whereupon he said he would call in the morning; that the next morning, when he called, Mr. Brunning gave him the bank book and vouchers, and told him that he had been instructed to get all overdrafts in, and said, "I have applied it and disbursed it," and that the bank could not carry the firm any longer. Fallon also said that the book was returned on August 2d, and showed that on July 31st $3,750.27 was placed to the credit of the firm; that on August 2d the books and vouchers returned showed that the bank had paid checks for $6,329.70 since the previous balance, and that it had credited the firm account with the last clean-up, and charged against the account the notes the firm had in the bank, and that there was still an overdraft of $133.70. The books of the bank, offered in evidence, showed deposits of proceeds of gold dust and check withdrawals and overdrafts. A deposit of $2,213.14 was made on July 18th; one of $500 on July 19th to reduce overdraft; one on July 31st of $3,750.27; while on July 16th overdraft was $133.71; on August 2d checks amounting to $6,329.70 were returned. Petition in involuntary bankruptcy was filed August 23, 1913.

The evidence showed that between June 11, 1913, when the firm commenced to do business with the bank, and July 31, 1913, the bank honored the checks of the firm and paid out for them $9,683.35, and received and credited gold dust from them amounting to $7,934. On the evening of July 31st a garnishment was levied upon the bank in an action brought by certain creditors against the firm, but these proceedings were all subsequent to the delivery of the gold dust to the bank. Brunning, the cashier, testified that the credit of the proceeds of the dust was made July 31st; that the books were balanced as on that day and that a deposit slip, which was introduced in evidence, showing the advance of $3,734.12 was made that day, but that the entries in the individual ledger carrying the credit and showing the charges were not made by the bookkeeper until August 1st and 2d; that, in accordance with the usual custom of the bank, the notes were treated as a check would be, and were charged up and the overdraft extinguished as far as could be, and that in this way he made the set-off then and there; that all was done before 6 o'clock, and that he did not then know anything of impending suits against the firm, or that its prospects were bad. The cashier explained an entry of $19.13 on August 2d as the difference between what the dust brought at $16.40 and what it realized after the assay; the purchase having been made at the rate of $16.40 an ounce, with the understanding that if it "went better" the firm would get the credit, but that if it did not go $16.40 the bank would sustain the loss.

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[1] Without statement of more of the evidence, we think it clearly shows that the gold dust was sold to the bank on July 31st in due and customary course of business; that the value was at once ascertained and credited by teller's slips, July 31st, to the account of firm, and at once offset against the notes and debts of the firm to the bank; that the bank acted in good faith, and had no knowledge, when it received the gold dust and credited the firm account, that the firm was insolvent, or that any unlawful preference would be given to the bank. The law which must control can be briefly stated:

[2, 3] The deposit of the proceeds of the gold dust to the credit of the firm in the bank did not operate to diminish the estate of the mining firm. The deposit was not a transfer of money as a payment or security. New York County National Bank v. Massey, 192 U. S. 138, 24 Sup. Ct. 199, 48 L. Ed. 380; Continental Trust Co. v. Chicago Title Co., 229 U. S. 435, 33 Sup. Ct. 829, 57 L. Ed. 1268. The transaction established the relationship of debtor and creditor. There having been a general deposit in course of business when the credit was made, the bank had a right to set off the notes and to dismiss the overdraft. Cumberland Glass Co. v. De Witt, 237 U. S. 447, 35 Sup. Ct. 636, 59 L. Ed. 1042; In re Wright-Dana Hardware Co., 212 Fed. 397, 129 C. C. A. 73.

[4] The fact that the books of the bank do not show the entry of the credit until August 1st does not change the character of the transaction, for the time the dust was delivered to the bank and credit therefor was actually given by the slips is the time when the deposit was made. 3 Ruling Case Law, 531; Wasson v. Lamb, 120 Ind. 514, 22 N. E. 729, 6 L. R. A. 191, 16 Am. St. Rep. 342. One bit of evidence which strongly, upholds the statement of the bank cashier as to the time when the credit was given is the testimony of Mr. Pratt, counsel for the creditors, who levied the writ of garnishment already referred to, who says that on the same evening that the attachment papers were issued he called up the officials of the bank and asked them what his clients "caught" by the garnishment, and was told nothing was attached, as the firm was heavily in debt to the bank, which had "just credited that clean-up," and that the firm still owed the bank. There is no showing of fraud in the transaction. The bank had paid checks for the half month preceding July 31st, when the firm was owing the bank a considerable amount, and, although the officers were solicitous about the account, they had no reasonable ground to believe that the condition of the firm was desperate, or that it would not be able to go on with its mining.

Counsel for the firm rely upon Mechanics' & Metals National Bank v. Ernst, 231 U. S. 60, 34 Sup. Ct. 22, 58 L. Ed. 121. But in the Ernst Case the deposits were not received in the usual course of business, and were really intended to be payments to give a preference. German-American State Bank v. Larimer, 235 Fed. 501, 149 C. C. A. 47. In Fourth National Bank v. Smith, 240 Fed. 19, 15 C. C. A. 55, the Court of Appeals of the Eighth Circuit, reviewing the more recent decisions by the Supreme Court, holds, as is undoubtedly the law, that, if a bank to which a depositor owes money had knowledge of the depositor's insolvency, but, prior to bankruptcy proceedings, sets off

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against the debt of the depositor the amount of the deposits made by the depositor in the usual course of business, the transaction is valid as a set-off under section 68a of the Bankruptcy Act, and is not a preference under section 60a of the Bankruptcy Act, inasmuch as the making of the deposit merely creates a relation of debtor and creditor between the bank and the depositor, and the application of the deposits to the indebtedness involves no transfer of the property.

It follows, from what we have said, that upon the established facts the court should have granted the motion for a verdict in favor of the bank. The judgment will be reversed, and the cause remanded, with directions to enter a judgment for the defendant notwithstanding the verdict.

(245 Fed. 316)

KATZ v. COMMISSIONER OF IMMIGRATION AT PORT OF SAN FRANCISCO, CAL.

(Circuit Court of Appeals, Ninth Circuit. October 1, 1917.)

No. 2812.

1. ALIENS ⟹51—DEPORTATION—GROUNDS.

Under Act Feb. 20, 1907, c. 1134, §§ 2, 3, 34 Stat. 898, 899, as amended by Act March 26, 1910, c. 128, §§ 1, 2, 36 Stat. 264 (Comp. St. 1916, §§ 4244, 4247), relating to the exclusion of aliens, and declaring that prostitutes and women and girls coming to the United States for the purpose of prostitution, or any other immoral purpose, and persons who are supported by or receive, in whole or in part, the proceeds of prostitution, shall not be admitted, and that any alien, having entered the United States, who shall receive, share in, or derive benefit from the earnings of any prostitute shall be deported, an alien who, after entrance into the United States, leases premises for use by prostitutes, is not, in view of the scope of the statute, to be deported; the provisions for deportation, under the principle of ejusdem generis, being directed at those persons, male or female, who directly live upon the earnings of prostitutes.

2. DISORDERLY HOUSE ⟹2—SUPPRESSION—NATURE OF POWER.

The power to regulate and suppress brothels is police in its character, and is one to be exercised by the states, rather than by the federal government.

3. ALIENS ⟹54—DEPORTATION—EVIDENCE.

In a proceeding for the deportation of an alien, evidence *held* insufficient to show that he was receiving the earnings of a prostitute.

4. DISORDERLY HOUSE ⟹17—OWNERSHIP—PROOF.

In a proceeding for the deportation of an alien on the ground that he was sharing in the earnings of prostitutes, proof of his ownership of a disorderly house cannot be made by proof of general reputation.

5. HABEAS CORPUS ⟹92(1)—DEPORTATION—FINDINGS BY COMMISSIONER—SCOPE OF REVIEW.

While the weight of the evidence supporting a finding of fact by the commissioner of immigration cannot be reviewed, the courts may determine on habeas corpus whether there was any evidence to support the commissioner's finding; that being a question of law.

Appeal from the District Court of the United States for the First Division of the Northern District of California; Maurice T. Dooling, Judge.

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Petition by Joseph B. Katz for writ of habeas corpus against the Commissioner of Immigration at the Port of San Francisco, Cal. From a judgment denying the writ, petitioner appeals. Reversed.

Marshall B. Woodworth, of San Francisco, Cal., and S. Luke Howe, of Sacramento, Cal., for appellant.

John W. Preston, U. S. Atty., and Caspar A. Ornbaun, Asst. U. S. Atty., both of San Francisco, Cal., for appellee.

Before GILBERT and HUNT, Circuit Judges, and WOLVERTON, District Judge.

WOLVERTON, District Judge. The appellant, an alien, who has been a resident in this country since 1906, was adjudged and ordered to be deported by the commissioner of immigration of San Francisco, on the charge of being "unlawfully within the United States, in that he has been found receiving, sharing in, or deriving benefit from the earnings of a prostitute or prostitutes." Subsequently appellant applied to the District Court for a writ of habeas corpus, the petition setting forth, by way of an exhibit attached thereto, all of the proceedings had before the commissioner of immigration. A demurrer was interposed to the petition, which, after presentation and argument, was sustained; the court holding that, as it appeared that the appellant was the owner of a house in which prostitution was practiced and carried on, and had received rent thereon from an inmate thereof, one Nellie White, it should be held that he was "deriving benefit from the earnings of a prostitute."

Error is assigned by appellant on account of this holding. It is further urged on the part of the government that the petition otherwise shows on its face that the appellant is guilty of receiving the earnings of prostitutes.

[1, 2] We must seek for the purpose and object of the statute, in order that we may properly construe the provision which it is claimed appellant has violated. Section 2 of the act in question, being that of February 20, 1907, as amended by Act March 26, 1910 (36 Stat. 263, 264), relates to the exclusion of certain classes of aliens. These are specified as idiots, imbeciles, feeble-minded persons, etc., and among the rest "prostitutes, or women or girls coming into the United States for the purpose of prostitution or for any other immoral purpose," and "persons who are supported by or receive in whole or in part the proceeds of prostitution." The language relating to this class of persons is of the same import as that contained in section 3, under which the charge against appellant is preferred. That of the latter section is no broader, and manifestly it was not intended to extend to any persons other than the language of section 2 was designed to reach. The manifest purpose of Congress was to exclude aliens of that particular class, as well as those answering to the other classes enumerated. Section 3 was designed to reach aliens, although admitted into this country, who should thereafter be found guilty of the acts proscribed. But the classification as it respects persons receiving the earnings of prostitutes is the same in both sections. It is very clear what persons are meant to be included by the classification:

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"An inmate of or connected with the management of a house of prostitution or practicing prostitution."

Over against this, but in the same connection, is included any alien who shall receive, share in, or derive benefit from the earnings of any prostitute. This alludes to another class, but allied in association to the prostitute class. It is perfectly well known what this class is. There are many vile persons of the male sex, who allow themselves to be "supported by" (using the language of section 2), and take the earnings of, fallen women, which they appropriate to their own particular use, and many of them have no other visible means of livelihood. This is not to say that women may not be guilty of living off the earnings of fallen women as well, nor that a man may not be guilty of keeping a brothel; but the two classes are clearly defined, so that there need be little uncertainty as to the style or character of persons Congress designed to comprise by such classification. It is quite unreasonable to suppose that the dry goods salesman or the grocer, who sells his goods to a fallen woman and takes the price from her, or a cabman, who carries her for hire and receives the hire from her, or, as in the present case, the landlord, who rents her abode to her and takes rental therefor, all or any of them were designed to be classified as persons who receive or derive benefit from the earnings of a prostitute, and such, we are impressed, is not the intendment of the statute.

The power to regulate and suppress brothels and bawdyhouses, which includes the regulation of leasing houses or buildings for such purposes, is police in character, and in general is exercised by the states and local municipalities, rather than by the general government; and the statute in question manifests no intendment to encroach upon or interfere with such regulations. It deals, as we have seen, with certain alien classes, and provides for the deportation of aliens comprised thereby, and, considering the spirit and purpose of the statute, we think that there is no intendment to include an alien landlord, who leases to a prostitute the house in which she lives or practices prostitution and receives from her the rental thereof. The spirit of the law is vital, for interpretation, where the letter leads to incongruities or absurdities. Holy Trinity Church v. United States, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226. This construction is as well within the doctrine of ejusdem generis, which we think is applicable here. 36 Cyc. 1119.

[3, 4] We now turn to the contention of the government that the petition of the appellant otherwise shows on its face that he was guilty of receiving the earnings of prostitutes. It will be kept in mind what the charge in the warrant is, and it is with reference to this charge, and to none other, that the inquiry must be conducted.

Numerous affidavits are set forth by the petition, by way of an exhibit thereto. We will make reference to such affidavits. Robert A. Peers, after setting forth certain matters respecting Harry Katz, avers that since the time alluded to "the two brothers, Harry Katz and Joseph Katz, have conducted a house of prostitution on the property [describing it], and it is a well-known fact in Colfax that the Katz brothers were interested in the management of this house of prostitution, over which Nellie White, a notorious prostitute, presided as

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madam," and that he has frequently heard the property described as the Katz house and the like. Lucy F. Peers deposes that "it was generally know that the Katz brothers were associated with the house." Jeannie K. Lobner deposes to the same effect, using practically the same language. Minnie G. Williams deposes as follows:

"The affiant further avers that it is understood, and, ever since the said H. H. Katz established said house of prostitution at the north entrance of town, it has generally been accepted as a fact by the people of Colfax, that the Katz brothers, H. H. Katz and Joseph Katz, conducted said house of prostitution at the north entrance to town, managing and directing the same, and that no one was ever heard to deny that they conducted and managed the said house of prostitution, until they, the Katz brothers, were arrested in 1914."

This affiant interposed another affidavit, which is in the nature of a reply to the argument of counsel for the appellant before the commissioner of immigration, and contains nothing additional. A number of citizens have also interposed a protest against efforts made to prevent the deportation of Harry and Joseph Katz; but it contains no averments purporting to set forth substantive evidence, unless it is wherein they say that:

"It has been a matter of common knowledge that they were profiting by the earnings of prostitutes."

These affidavits and protests contain the strongest showing made against Joseph Katz respecting his alleged receiving of the earnings of a prostitute or prostitutes. The very best that can be made out of the testimony, and the whole thereof contained in the record, is that it is wholly hearsay and based upon common repute in the vicinity; the affiants generally asseverating upon information and belief. There is practically no substantive testimony of fact. Locally—that is, in the state of California—the fact that a house is being conducted as a house of ill fame may be shown by common repute; but there is no rule of which we are aware by which the ownership or management of such a house may be so proven. Of course, if it were shown that Joseph Katz was conducting or managing such a house, it would be a reasonable inference and deduction that he was taking the earnings of the inmates. There is not a syllable of testimony that he accepted such earnings, except that he was the owner of the house and accepted rentals from the occupant, which in itself, as we have seen, is not sufficient to condemn him under the charge. Some substantive evidence of the fact of managing and conducting such a house, besides mere hearsay and expression of opinion and belief (which is practically the equivalent of no competent evidence of the fact sought to be proven), is necessary upon which to base the inference of his having taken the earnings of the inmates.

[5] We are aware of the holding of the Supreme Court that the question is for the commissioner of immigration, and the court is not permitted to look behind his finding, when it is a matter of weighing the evidence; but where there is substantially no evidence competent to establish the charge preferred, it then becomes a question of law for the court. The principle involved has been substantially determined by the case of Backus v. Owe Sam Goon, 235 Fed. 847, 149 C. C. A.

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159. In this view, the petition of appellant states a good cause for the writ.

The judgment of the District Court will therefore be reversed, and the cause remanded for such other proceedings as are not inconsistent with this opinion.

(245 Fed. 320)

BACKUS, Commissioner of Immigration, v. KATZ.

(Circuit Court of Appeals, Ninth Circuit. October 1, 1917.)

No. 2917.

ALIENS ⟹54—DEPORTATION PROCEEDINGS—EVIDENCE.

In a proceeding for the deportation of an alien, evidence *held* insufficient to show that he had received or was receiving the earnings of a prostitute; hence deportation was improperly ordered.

Appeal from the District Court of the United States for the First Division of the Northern District of California; Maurice T. Dooling, Judge.

Petition by Harry Katz for writ of habeas corpus against Samuel W. Backus, as Commissioner of Immigration at the port of San Francisco, now succeeded by Edward White, as Commissioner of Immigration at said port. From a judgment discharging petitioner from the judgment and order of the Commissioner directing deportation, the Commissioner appeals. Affirmed.

John W. Preston, U. S. Atty., and Caspar A. Ornbaun, Asst. U. S. Atty., both of San Francisco, Cal., for appellant.

Marshall B. Woodworth, of San Francisco, Cal., and S. Luke Howe, of Sacramento, Cal., for appellee.

Before GILBERT and HUNT, Circuit Judges, and WOLVERTON, District Judge.

WOLVERTON, District Judge. This case is here on appeal by the commissioner of immigration from the judgment discharging the appellee from the judgment and order of the commissioner directing his deportation. The cause first came up for hearing in the District Court, on demurrer to the petition of appellee for a writ of habeas corpus. The demurrer being overruled, a hearing was had on the merits, resulting in the discharge of the appellee.

The same question is presented here as in the case of Joseph B. Katz v. Commissioner of Immigration, 245 Fed. 316, 157 C. C. A. 508, which is decided herewith, namely, whether the testimony before the commissioner is of a nature to support his finding and order of deportation. Besides the testimony noticed in the Joseph B. Katz Case, to which reference is here made, we will review the additional testimony contained in this record which has allusion to Harry Katz.

Harry Katz was a resident of Sacramento, in the state of California, but an occasional visitor to Colfax. Charles H. Hill deposes that, in the latter part of 1909 and the early part of 1910, he saw a person,

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known to him by sight as Harry Katz, frequently enter and leave a certain house on Church street, as much as several times a day and on many days; that he saw him superintend alterations and repairs, and enter the house with parcels and leave without them, and in many and divers ways show more than ordinary interest in it. Frank Schillinger says that Katz used said property as a house of prostitution, remodeling the same, and adding small rooms thereto. This does not refer to the house which Joseph Katz owned later. Edward H. Honn deposes that he knew of Katz when it was commonly understood that he conducted and managed a house of prostitution on Church street; that after his arrest, in 1909, Katz proceeded, within a few weeks, to get possession of a house and lot at the north entrance of the city, and to enlarge said house and equip it for prostitution, and, according to general repute, that he continued to conduct and manage it as a house of ill fame; and that he came regularly and continuously from Stockton or Sacramento to Colfax, and remained several days each month, with headquarters in said house, and that Nellie White was commonly described as "Nellie Katz" and as the "Katz woman." Fergus Graham Irving testifies that he has frequently seen Harry Katz, during the last two years, about said house at different times of the day, and that he seemed to be entertaining female inmates; Robert F. Pottol, that these houses were spoken of, and by common repute were known, as houses of ill fame; J. T. Taylor, that during the erection of said house he frequently saw Katz superintending and directing about the place, and acting in a manner indicating proprietorship; Harvey L. Wolfsen, that during the winter of 1912–13 he saw Katz about the house, apparently superintending the repairing. Then follows the statement of an immigration inspector, which cannot be regarded in any sense as testimony to establish the charge.

Now, while there is a variation of the showing here, there is nothing of substance to differentiate this from the Joseph B. Katz Case, and what we have said there upon the subject in hand has pertinent application here, and is decisive, also, of the present controversy. There is no substantive proof in the record competent to establish the fact alleged that appellant received or was receiving the earnings of a prostitute. The Joseph B. Katz Case is therefore decisive of this, and the judgment of the District Court will be affirmed.

(245 Fed. 321)

THE GEORGIANA.

ATLANTIC MARITIME CO. v. TYSELL et al.

(Circuit Court of Appeals, First Circuit. July 27, 1917.)

No. 1271.

1. SALVAGE ⟹8—RIGHT TO COMPENSATION—NATURE OF SERVICE.

Members of a crew of a vessel, which had grounded and whose entire crew had left her, while trying to return to the schooner to take a fresh departure for the shore, found that she had floated off and was beating about by herself, not over a mile from a dangerous and little frequented

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shore. They boarded her, found her down by the head, and her rudder damaged or displaced, but hoisted her jib, and found that she could be got to make headway on a course which finally grounded her on a beach, where she was in no danger. *Held*, that these services were salvage services, entitled to be compensated as such, unless their connection with the vessel or her voyage precluded them from acquiring rights as salvors.

2. SEAMEN ⟹28—SHARE IN EARNINGS—LIEN.

Where a fishing trip is undertaken on what is known as the quarter lay plan, whereby the owners have one-quarter of the net proceeds, and the other three-quarters are shared by the master and men in various proportions, bait, ice, and provisions being first paid for, the members of the crew have a lien upon the vessel and the catch on board, corresponding to the lien of seamen shipped for hire in the ordinary way.

3. SALVAGE ⟹18—RIGHT TO COMPENSATION—MEMBERS OF CREW.

Members of a fishing crew shipping on the quarter lay plan, while they remain bound by their engagement, are regarded as under contract to do all within their power, whatever the emergency, for the safety of the vessel and the catch, and as incapable, like seamen serving for wages, of becoming salvors, but as soon as they are discharged from their agreed service, formally or expressly, or by implication from the circumstances, and have been released from any obligation to exert themselves for the benefit of the vessel or property on board her, their previous connection with the vessel does not prevent them from becoming salvors in respect of any such exertions.

4. SALVAGE ⟹48—RIGHT TO COMPENSATION—EVIDENCE.

In a suit for compensation for services rendered by members of a crew, who returned to their vessel and brought it to a place of safety after it had been deserted by the master and crew, evidence *held* to support the District Court's finding that the vessel and the voyage were abandoned when all hands left the schooner, though there was some evidence that the master intended to return, and though he gave some orders to the members of the crew after leaving the schooner.

5. SALVAGE ⟹29—AMOUNT.

Where members of a crew of a schooner, which had grounded and been deserted, found that she had floated off and was then within a mile of a dangerous and little frequented coast, and at considerable danger to themselves boarded her and brought her aground on a beach, where she lay in safety, and worth $2,500 in her damaged condition, a salvage award of $200 to each of the two libelants would not be reduced, though the amount of the labor or skill involved was not considerable.

Appeal from the District Court of the United States for the District of Massachusetts; James M. Morton, Jr., Judge.

Libel by John W. Tysell and others against the schooner Georgiana; the Atlantic Maritime Company, claimant. From a decree for the libelants, the claimant appeals. Affirmed.

George L. Dillaway, of Boston, Mass., for appellant.

Howard W. Brown, of Boston, Mass., for appellees.

Before DODGE and BINGHAM, Circuit Judges, and BROWN, District Judge.

DODGE, Circuit Judge. Appealing from a salvage award of $200 to each of the two libelants here appellees, the owners of this schooner contend that the services for which the award is made were rendered while said libelants were members of her crew, and therefore incapable of acquiring rights as salvors against her.

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The schooner was a fishing vessel, on a fishing voyage at the time. Her crew numbered 22 including the two libelants. About two weeks after leaving Gloucester, during which time she had taken 50,000 or 60,000 pounds in all of cod and haddock then on board, she ran aground on the southerly end of Black Ledge, distant about 3 miles from Isaacs' Harbor, which is some 70 miles east of Halifax, on the Atlantic coast of Nova Scotia. Her entire crew left her in dories for the shore soon afterward. This they did at about 2:30 a. m., on Thursday, December 30, 1915, leaving the schooner apparently fast aground, rolling and pounding on rock bottom, and already leaking badly. That it was unsafe for them to stay longer aboard her where she was is undisputed; it was snowing, and the wind, from about E. N. E., was blowing at the rate of 20 or 25 miles an hour.

When all hands left her as above, the master had told the crew "it was all off," and had recommended them to take with them in the dories such of their clothes and personal effects as they could get together without losing much time. He directed the dories to keep together after leaving the vessel, in order that he, being acquainted with the locality, might pilot them to a safe landing place. He has testified that he intended next morning to try and save all the property, if possible and if there was a chance to do it. He tried, after getting ashore, to find a motorboat which he could use, and which would have been necessary in any such attempt, but was unable to procure one. That he told all the crew, before they left her, what his intentions were as to any further attempt at saving the vessel, does not appear; but there is evidence that he told some of them, who were in the same dory with him, while rowing ashore. Whether there could have been any chance of saving her, or anything from her, had she remained on the ledge where she grounded, depended altogether on the wind and weather. Had the wind increased, or changed so as to blow more from the eastward, it may be assumed that there would have been no chance at all.

The two libelants and another of the crew (who has disclaimed any right to salvage) left the schooner as the only occupants of the same dory. They lost sight of the other dories, and later found themselves heading toward breakers not very far from Black Ledge, became uncertain as to the proper course toward the landing for which the other dories were heading, and turned back to find the schooner again, in order to take a fresh departure from her. While rowing toward her supposed position, they sighted a red light, which proved to be her port light, and they then found that she had floated off the place where she had been left aground and was beating about by herself between Black Ledge and the shore. They boarded her, found her down by the head, with the water over her forecastle and cabin floor, so that nothing could be accomplished by such pumping as they could do, but nevertheless capable of staying afloat for a while longer. She had been left with her jib triced up, her forestaysail, foresail, and mainsail set, the main sheet being slacked off. Attempts to steer her showed that her rudder had been so damaged or displaced that she would not answer her helm. She was coming up to and falling off again from

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the wind. Directly to leeward there was, as the chart shows, a dangerous shore not over a mile distant.

They thereupon lowered, cut loose, and hoisted the schooner's jib; and found, after it was set, that she could be got to make headway on a course which ultimately took her to a point at the head of Fisherman Harbor, some 2 miles or more distant from the place where they had found her, and nearly 3 miles in a direct line from where she had been aground on Black Ledge. They kept sounding, with tackle which they improvised, as she progressed. She ran aground, at the point where she reached the shore, on a beach; and was thereafter in no danger either of sinking in deep water or of drifting ashore upon rocks. They then took down her sails, having to cut the halyards in order to get the mainsail down, and waited for daylight. Soon after daylight the master who had landed considerably earlier, with the remainder of the crew, not far away, came aboard and asked the three men to watch her while he went to the nearest telegraph office, some 4 miles distant. They stayed aboard her during the day, but not during the following night. Other members of the crew visited the vessel while she lay there, and removed what they could find aboard her belonging to them. She was later removed and taken ultimately to Gloucester, with the aid of a wrecking steamer sent for by the master. In this, however, the crew did not take any part; they left for their homes on Sunday, January 2d; the wrecking steamer having arrived before they left.

[1] The above services would, without doubt, have been salvage services, entitled to be compensated as such, if rendered by persons in no way connected with the vessel or her voyage. The schooner, afloat, deserted, and sinking, off a little frequented and dangerous coast, as these men found her, was clearly in imminent danger of total loss. To board her and stay aboard her, as they did, in such weather, unable to direct her movements, except to a limited degree, and uncertain how long she would be able to keep afloat, involved real danger to them, even if it be conceded that statements in the opinion below, that they had lost their dory when they boarded the schooner and that no other small boats appear to have been left on board her, are not sufficiently supported by the evidence. That her owners were enabled to get her back to Gloucester in a reparable condition may fairly be said to be due to their exertions from the time they discovered her afloat until she was beached at Fisherman Harbor. Not only is this conclusion fully supported by the evidence, but on January 2d, in a communication to the insurers of three-eighths of the vessel owned by him, the master stated in writing his opinion that the three men were "entitled to some recompense for their part in putting the vessel where she can be saved; otherwise she would be a total loss."

The alleged salvors had not been serving on the schooner for wages. The fishing trip for which they shipped had been undertaken upon what is known as the "quarter lay" plan; i. e., the owners were to have for the use of their vessel one-quarter of the net proceeds of the catch, a part of said quarter being due from them to the master; the other three-quarters were to be shared by the master and the men engaged, in

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various proportions, bait, ice, and provisions for the voyage being first paid for therefrom.

[2] For the value of their respective shares in the catch taken, upon a trip made upon terms like the above, the members of a fishing crew have a lien upon the vessel and the catch on board, corresponding to the lien of seamen shipped for hire in the ordinary way, for their unpaid wages against vessel, cargo and freight pending, so long as anything remains of either. See The Carrier Dove, 97 Fed. 111, 38 C. C. A. 73, decided by this court in 1899.

[3] While the members of such a crew remain bound by their engagement for the trip, they are to be regarded as under contract to do all that it may be within their power to do, whatever the emergency, for the safety of the vessel and catch, and as incapable, like seamen serving for wages, of becoming salvors as to the same.

But as soon as the members of such a crew are discharged from their agreed service, whether formally or expressly, or by implication from the circumstances, and have been thus released from any obligation to exert themselves for the benefit of the vessel, or property on board her, their previous connection with the vessel does not prevent their becoming salvors in respect of any such exertions. The District Court has found that this vessel was finally abandoned when her master and crew left her aground on Black Ledge, and that the men on board were thereafter released from further obligation to her; a finding which her owners assert to have been unjustified by the evidence, and therefore erroneous.

[4] As has been stated, the master told the men "it was all off" at the time they took to the dories. There is no evidence that he ever formally or expressly discharged them, except that one of the two libelants testified that he told them next day, at Fisherman Harbor "they were all clear." There were no wages due them; and as to their shares in the catch, it would in any case have had to arrive where it could be sold before their claims to a share could have amounted to anything; and there is no proof that such claims were ever of any value. The fish on board was not proceeded against in this case, nor its proceeds in the owners' hands, and what became of it, or any proceeds therefrom does not appear; but the evidence tends to show that, after the vessel had filled, it would not be worth enough, in any event, to cover the expenses chargeable to the crew for the trip. As to the master's intention of returning next day to the vessel on the ledge, we can hardly regard it as of any significance after the vessel had come off that ledge and become exposed to the very different and more immediate danger of sinking before daylight, thus changing altogether the situation to which the alleged intention related. After telling them that "they were all clear," instead of keeping them together for any further continuance of the trip with the schooner, beached as she then was and the wrecking steamer expected, we do not think he can claim to have held them until that moment bound to the vessel's service, in view of his statement to them the night before when they were leaving the vessel, that "it was all off." It does not appear that the schooner afforded either of the men on board her or

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any of the crew food or shelter while they remained at Fisherman Harbor. It is said that during her stay there they obeyed the master's orders until after he had told them "they were all clear." While some suggestions or requests made by him appear to have been followed, it is not clear from the evidence that these were either given or understood as orders to a crew in the vessel's service. Upon the evidence we cannot hold the District Court's finding that vessel and voyage were abandoned when all hands left the schooner on Black Ledge to have been erroneous.

[5] The schooner is valued for the purposes of this case at $2,500, which must necessarily mean that she had that value as she lay on the beach in her damaged state, as above. Although the time occupied by the libelants' services was short and the amount of labor or skill involved not considerable, the value to the vessel of the result accomplished was so important as to prevent us from reducing the amount awarded on the ground that it is excessive.

The decree of the District Court is therefore affirmed, and the appellees recover their costs of appeal.

(245 Fed. 326)

HESKETT v. PENNSYLVANIA CO.

(Circuit Court of Appeals, Sixth Circuit. October 2, 1917.)

No. 3004.

1. MASTER AND SERVANT ⟹110—INJURIES TO SERVANT—STATUTE.

Under Gen. Code Ohio, § 8951, forbidding common carriers to haul a locomotive not provided with secure grabirons or handholds in the sides and ends thereof, a railroad company is guilty of negligence, where it operated an engine on the pilot of which a turtleback or iron bar had been placed, which rendered it impossible to use the handholds.

2. MASTER AND SERVANT ⟹286(5), 289(1)—NEGLIGENCE ⟹97—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Gen. Code Ohio, § 9018, declaring that, in actions brought against a railroad company for personal injuries to an employé, the fact that the employé was guilty of contributory negligence shall not bar recovery, when such negligence was slight and that of the employer great, but that damages must be diminished, and that all questions of negligence and contributory negligence shall be for the jury, abolishes the common-law rule of contributory negligence as an absolute bar, and adopts the rule of comparative negligence, making the questions whether the railroad employé's negligence was slight as compared with that of the company, as well as the comparative degrees of negligence, jury questions.

3. MASTER AND SERVANT ⟹296(13)—INJURIES TO SERVANT—INSTRUCTIONS—PROPRIETY.

Plaintiff, a railroad section hand, suffered injuries when he attempted to board a moving engine, and in an action for such injuries contended that they resulted from the negligence of the company in placing a heavy iron bar or turtleback on the pilot of the engine, which prevented him using the handholds. The court charged that, if plaintiff was warned before the accident not to attempt to get on trains or engines in motion, then under the circumstances with respect to the speed of the engine and the small space between the engine and the car, where plaintiff

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stated he attempted to board the engine, plaintiff could not recover, though the railroad company was negligent as claimed, because having warned him not to board moving train, the company was under no duty to make conditions safe for him. *Held*, that the instruction, which must be interpreted as relating solely to the railroad company's negligence, was proper only if the warning to plaintiff amounted to an actual and subsisting prohibition against boarding a moving train, and where the evidence showed that, though section hands, including plaintiff, were warned not to board moving trains, nevertheless their superiors acquiesced in their boarding moving trains, and did not stop trains which used to carry such employés to and from their work, the instruction was improper, tending to mislead the jury, for a railroad company cannot prohibit employés from boarding moving trains and at the same time permit them to do so, and escape responsibility.

4. MASTER AND SERVANT ⟹244 (3)—INJURIES—NEGLIGENCE.
A railroad employé, who boarded a moving train in violation of mere warnings, is guilty of only contributory negligence, and unless the warnings amounted to a prohibition the company's negligence in equipping an engine, which contributed to the injury, furnishes basis for recovery.

In Error to the District Court of the United States for the Northern District of Ohio; John H. Clarke, Judge.

Action by William Heskett against the Pennsylvania Company. There was a judgment for defendant, and plaintiff brings error. Reversed and remanded, with directions to grant new trial.

Anderson, Matthews & Wall, of Youngstown, Ohio, for plaintiff in error.

Arrel, Wilson, Harrington & De Ford, of Youngstown, Ohio, for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. Plaintiff in error, who was plaintiff below, was in the employ of defendant in error as a member of a special section gang of 20 to 30 men engaged in resurfacing track and making fills with slag, which was hauled for the purpose on cars drawn by a yard engine operated by a regular crew; the engine being provided at both the tender and pilot ends with footboard and grabirons or handholds. For the purpose of riding to dinner at the camp maintained by the railroad company, plaintiff attempted to step on the footboard on the front or pilot end of the engine, which was then moving, tender foremost, at a speed of 8 to 12 miles an hour and hauling six empty cars; he missed either his footing or his handhold, fell under the cars, and lost a leg.

Plaintiff claims that the accident was due to the negligent presence on the pilot, unknown to him, of a "turtleback"[1] which so protruded over

[1] A turtleback is described as a channeled and flanged piece of iron, about 3 feet long and 6 inches wide, tapered down at each end and higher in the center, weighing from 50 to 150 pounds, and used for rerailing cars.

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the footboard and handhold as to contact with plaintiff's hand, preventing his grasping the handhold, and causing him to lose his balance.

Defendant denied that there was a turtleback on the pilot, gave evidence tending to show that plaintiff's fall was due to stumbling when trying to mount the footboard, and that his attempt to mount the moving train was in disobedience of express instruction to the contrary, which disobedience directly and proximately caused the accident; also pleading that plaintiff was guilty of contributory negligence in attempting to board the moving engine in the manner adopted and under the existing conditions.

At the conclusion of the testimony on the trial the jury was instructed that (in the absence of warning to plaintiff not to get on moving trains or engines) it was defendant's duty to keep the handhold accessible, and it would be liable for permitting the turtleback to be so laid upon the pilot as to cause plaintiff's accident, through his inability to seize the handhold, and that in such case, if plaintiff's negligence was slight and that of the defendant greater in comparison, the damages must be diminished in proportion to the amount of negligence attributable to plaintiff.

The court further charged, however, that:

> If plaintiff was warned before the accident, "as the defendant claims," not to attempt to get upon trains or engines when in motion, "then, under the circumstances shown in this case with respect to the speed of the engine and the small space between the engine and the car, where [plaintiff] says he attempted to mount the engine, the plaintiff would not be entitled to a verdict in his favor even if the railroad company was negligent, as he claims that it was, because having warned him not to attempt what he did attempt to do, the company was under no legal duty to make conditions safe for him if he violated that warning."

Defendant had verdict and judgment. The only question before us concerns the correctness of this latter instruction.

[1, 2] The instruction was proper only upon the theory that defendant owed plaintiff no duty to keep conditions on the pilot safe for plaintiff, and was thus not itself negligent. The accident happened in Ohio. Section 8951 of the General Code forbids a common carrier to haul a locomotive "not provided with secure grabirons or handholds in the sides and ends thereof"; and we have no doubt that making the handhold inoperative by carrying a turtleback on the pilot is within the statute. See by analogy United States v. Illinois Central R. R. Co. (C. C. A. 6) 177 Fed. 801, 101 C. C. A. 15. Plaintiff's contributory negligence did not necessarily bar recovery. Section 9018 of the General Code of Ohio provides that:

> In actions brought against a railroad company for personal injuries to an employé the fact that the latter is "guilty of contributory negligence shall not bar a recovery when such negligence was slight and that of the employer greater, in comparison. But the damages must be diminished by the jury in proportion to the amount of negligence attributable to such employé. All questions of negligence and contributory negligence shall be for the jury."

This statute abolished the common-law rule of contributory negligence as an absolute defense in bar, and adopts the rule of comparative

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negligence, in cases where the negligence of the plaintiff is slight and that of the defendant greater in comparison.[2]

The questions whether plaintiff's negligence was slight as compared with that of defendant, as well as of comparative degrees of negligence, were for the jury (Lewis v. P., C., C. & St. L. Ry. Co., supra; Sherman v. T. & O. C. Ry. Co., 25 O. C. D. 449, 453, affirmed 88 Ohio St. 617, 106 N. E. 1083); as was also the question of proximate cause (Erie R. R. Co. v. White, 187 Fed. at page 559, 109 C. C. A. 322; Hales v. Mich. Central R. R. Co. [C. C. A. 6] 200 Fed. 533, 537, 118 C. C. A. 627).

Should we take judicial cognizance of the fact that defendant was engaged in interstate commerce, and the Federal Safety Appliance Act (Act March 2, 1893, c. 196, 27 Stat. 531 [Comp. St. 1916, §§ 8605–8612]) thus exclusively applicable (Texas & Pacific R. R. Co. v. Rigsby, 241 U. S. 33, 37, 41, 36 Sup. Ct. 482, 60 L. Ed. 874), the situation, under familiar rules, would be even more favorable to plaintiff, so far as the defense of contributory negligence is concerned.

[3, 4] But we construe the criticized instruction as not intended (as plaintiff in error regards it) to relate to the subject of plaintiff's negligence, which was elsewhere properly treated, but only to defendant's negligence, although considerations of speed of train and small space between engine and car, mentioned by the court, related only to that subject. In its instructions concerning the alleged warning, the court rightly disregarded an alleged general rule of defendant prohibiting the mounting of moving cars, for lack of evidence of its applicability to members of the section gang in question.

We think the criticized instruction was proper, provided the warning referred to amounted to an actual and subsisting prohibition, so understood by plaintiff, against mounting a moving train. If it fell short of that, its disregard would be at most merely contributory negligence. We are not satisfied that the jury would naturally understand the instruction as relating to an actual prohibition of that character. While there was express testimony that the members of the work gang generally, including plaintiff, had been warned by the section foreman and the train conductor every morning (including the morning of the day of the accident) not to attempt to get on or off a moving train, it was not only undisputed that the men were permitted to ride on the cars between the camp and the place of work (the foreman testifying, "Of course they ride on the train going to and from their work"), the only limitation being the asserted warning—not conceded, but denied—against getting on or off the cars when in motion; but there was also substantial testimony that the members of the work gang were in the habit of getting on and off the moving trains for the purpose of riding between the camp and the place of work, without objection or protest from the

[2] Lewis v. P., C., C. & St. L. Ry. Co., 89 Ohio St. 9, 13, 104 N. E. 1002; Erie R. R. Co. v. White (C. C. A. 6) 187 Fed. 556, 558, 109 C. C. A. 322; Erie R. R. Co. v. Kennedy (C. C. A. 6) 191 Fed. 332, 335, 112 C. C. A. 76; Standard Steel Tube Co. v. Prusakicuelcz, 23 O. C. D. 133, 136, affirmed 87 Ohio St. 472, 102 N. E. 1131.

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foreman or conductor; that the train never stopped for the purpose of letting the men on or off, the foreman telling them to "just pile on the best you can." The testimony would support a conclusion that the alleged warnings were never enforced, but were habitually disregarded, with the apparent acquiescence and implied approval of the officers whose duty it was to enforce them—the foreman even admitting that he himself sometimes got off and on the train when in motion. But even if the proof fell short of an inference that the conductor so approved, a warning by the gang foreman would, under the instruction, bar recovery.

Moreover, to warn does not necessarily mean to "forbid"; it may mean only to "caution" or "admonish."

In fact the foreman said at one point in his testimony:

"I had seen the men getting on and off the moving cars previously lots of times, but I always warn them when going on the main track to be very careful about getting on and off moving cars when they were on the main track."

But, whatever may be the definition of the word "warn," a railroad company cannot categorically prohibit, and at the same time constantly permit, its employés to mount moving cars and still escape responsibility. Spaulding v. Railroad, 98 Iowa, 205, 211, 67 N. W. 227; No. Pacific R. R. Co. v. Nickels (C. C. A. 8) 50 Fed. 718, 722, 1 C. C. A. 625; Knickerbocker Ice Co. v. Finn (C. C. A. 2) 80 Fed. 483, 25 C. C. A. 579; Eastman v. Railroad Co., 101 Mich. 597, 602, 60 N. W. 309; Railroad Co. v. Reagan, 96 Tenn. 128, 139, 140, 33 S. W. 1050. In this state of the testimony, an unqualified instruction relieving the defendant, as matter of law, from all liability in case the claimed warning had been given, was, in our opinion, erroneous; for we think the jury may not unreasonably have understood it as forbidding recovery from the mere fact of verbal warning at any previous time, regardless of the question of defendant's implied permission to the contrary.

For this reason the judgment must be reversed, and the cause remanded to the District Court, with directions to award a new trial.

(245 Fed. 330)

RICHARD et al. v. PARKER et al.

(Circuit Court of Appeals, Eighth Circuit. August 21, 1917.)

No. 4799.

INDIANS ⟹16(3)—LANDS—OIL LEASE BY MINOR—EFFECT OF DEATH OF LESSEE.

In 1912 a Creek minor of the full blood, through his guardian, and with the approval of the Secretary of the Interior, executed an oil and gas lease on his allotment, which was subject to restrictions upon alienation. The lease provided for the payment of royalties to the Indian superintendent for the benefit of the lessor, and under the regulations of the department to which the lease was subject the superintendent was authorized to withhold payment of such royalties until it was considered for the interest of the minor or his heirs that they should be paid over. The lease further provided that, in event restrictions on alienation should be removed, it should be released from the supervision of the Secretary.

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and royalties should be paid to the lessor, or the then owner of the land. The lessor died while still a minor, leaving his father as his sole heir. A large sum in royalties had previously been paid to the superintendent, and other royalties were thereafter paid to him. Act May 27, 1908, c. 199, § 9, 35 Stat. 315, provides that "the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: Provided, that no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee." *Held* that, under such statute, the effect of the death of the lessor was to terminate all control over the land and of the lease by the Secretary, and also over the royalties previously collected.

Stone, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Suit in equity by Eastman Richard and another, administrators of the estate of Samuel Richard, deceased, against Gabe E. Parker and another. Decree for defendants, and complainants appeal. Reversed.

Britton H. Tabor and J. B. Lucas, both of Checotah, Okl., for appellants.

Paul Pinson, Sp. Asst. U. S. Atty., of Muskogee, Okl. (D. H. Linebaugh, U. S. Atty., and W. P. McGinnis, Sp. Asst. U. S. Atty., both of Muskogee, Okl., on the brief), for appellees.

Before CARLAND and STONE, Circuit Judges, and MUNGER, District Judge.

MUNGER, District Judge. Samuel Richard, a minor, was a full-blood citizen of the Creek Nation of the Five Civilized Tribes of Indians, residing in Oklahoma. He held an allotment of 160 acres of land. On April 13, 1912, acting through his guardian, he executed an oil and gas lease of this land to the Kathleen Oil Company. The lease was approved by the probate court and by the Secretary of the Interior. On January 24, 1916, and while yet a minor, Samuel Richard died, and thereafter appellants were appointed as his administrators. The sole heir of Samuel Richard is his father, Eastman Richard, who is one of the administrators.

The lease provides for a payment to the United States Indian superintendent, for the use of the lessor, of a royalty on the proceeds of oil and gas obtained from the land. The lessee and its assigns have extracted large quantities of oil from the land, both before and after the death of the lessor, and have paid the superintendent, as royalties, the sum of $216,145.16. The greater portion of this amount was paid during the lifetime of the lessor. This suit was brought by the administrators of Samuel Richard against the superintendent and cashier of the Five Civilized Tribes to recover this money and to restrain them from collecting royalties further under the lease.

Under the original Creek treaty (Act March 1, 1901, c. 676, 31 Stat. 861) and the supplemental Creek treaty (Act June 30, 1902, c. 1323, 32 Stat. 500) the alienation of allotted lands was forbidden for a fixed period, without the approval of the Secretary of the Interior. By subsequent acts of Congress (Act April 21, 1904, c. 1402, 33 Stat.

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189; Act April 26, 1906, c. 1876, 34 Stat. 137; Act May 27, 1908, c. 199, 35 Stat. 312) certain classes of beneficiaries were released from the restrictions upon alienation, but the land of Samuel Richard, as a minor, was subject to restrictions upon alienation during his lifetime. At the time of the execution of the lease to the Kathleen Oil Company, section 2 of the last-mentioned act of Congress contained this provision:

"That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by the allottee if an adult, or by guardian or curator under order of the proper probate court if a minor or incompetent, for a period not to exceed five years, without the privilege of renewal: Provided, that leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise."

In the lease appeared this condition:

"In event restriction on alienation shall be removed from all the leasehold premises described above, this lease shall be released from the supervision of the Secretary of the Interior, such release to take effect without further agreement, from the date such restrictions are removed, and thereupon the authority and power delegated to the Secretary of the Interior as herein provided shall cease, and all payments required to be made to the United States Indian superintendent shall thereafter be made to lessor or the then owner of said lands in person or be deposited to the credit of said lessor or his assigns at the Eufaula National Bank, of Eufaula, Oklahoma, or at such other place as the said lessor or his assigns may from time to time designate in writing, and changes in regulations thereafter made by the Secretary of the Interior applicable to oil and gas leases shall not apply to this lease."

The lease recited that it was subject to the regulations of the Secretary of the Interior then or thereafter in force. The regulations promulgated by the Secretary provided for the payment to the United States Indian agent of all royalties accruing under any lease made on behalf of a minor, and for the retention of these funds by the superintendent, or other designated disbursing officer, to the credit of the guardian of the minor. The superintendent was authorized by these regulations to withhold the disbursement of this money until it was considered for the interest of the minor or his heirs that it should be paid. The question presented for decision is whether the restrictions in the lease and in these regulations are still in force, or were they abrogated by that portion of section 9 of the act of May 27, 1908, which reads as follows:

"That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: Provided, that no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee."

In the acts which have been cited, Congress has manifested its intention gradually to release governmental control over the lands of those members of the Five Civilized Tribes who were deemed capable of the management of their own property. The act of May 27, 1908, very greatly enlarged the classes of those who were left free to deal

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with their allotments. In the committee reports to each house of Congress, accompanying the bill, it was stated that one object of the bill was to release about 8,000,000 acres, or one-half, of the restricted allotments from further supervision by the United States over its alienation. Among other provisions for such release is that found in section 9 of the act, which has been quoted above. The language of this section seems clear and definite. The death of an allottee removes all restrictions over the alienation of his land, other than a homestead, except that no conveyance of any interest in the land by a full-blood Indian heir is valid unless approved by the proper probate court. No exception was made because of existing leases of the land, unless a lease had been executed, but had not been approved by the Secretary of the Interior; in that case, the lease was subject to the approval of the Secretary (section 3). Congress knew that many leases of Indian lands were outstanding, for it had authorized their execution by previous acts, and by section 3 of this act it permitted allottees of land from which restrictions were removed to cancel the leases upon agreement with the lessees. The omission to reserve any other supervision than that by the probate court over conveyances by full-blood heirs of allottees is rendered more significant by the fact that, in the next proviso in section 9, the right of supervision by the Secretary of the Interior over another class is expressly retained.

Notwithstanding the fact that Congress left but one restriction upon the alienation of this land, the control of the probate court, appellees claim that other restrictions exist to the extent that the Secretary of the Interior may collect the royalties under the lease made by the deceased allottee and may retain from his administrators the royalties collected before and since his death. In support of this claim appellees say that the Secretary of the Interior had the authority at the time this lease was made to make regulations as to the approval of the leases executed by minor allottees which had the force and effect of law; that these regulations provided for the impounding of the royalties and for the payment to the lessor, or his heirs, at the discretion of the Secretary as to time and amount; that the lease by Samuel Richard provided that it should be released from the grasp of these regulations only when all restrictions should be removed; and that as one restriction still exists, because the consent of the probate court must be obtained to validate a conveyance by the heir, all restrictions have not been removed, and therefore the terms of the lease and of the regulations of the Secretary remain in force as to control of the royalties. The answer to this contention is that the powers of the Secretary of the Interior over this land are only derivative. These supervisory powers, as expressed either in the regulations of his department, or in the lease, cannot survive the grant under which they were made, and when Congress declared that all restrictions upon alienation, except one, were removed, none of the powers reserved in the regulations and lease longer remained operative. By the enactment of this statute the right was conferred upon the heirs of the allottee to make a conveyance of the allotment upon the one condition of its approval by the proper probate court, and the ap-

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proval of the Secretary of the Interior was unnecessary. United States v. Knight, 206 Fed. 145, 124 C. C. A. 211; Harris v. Gale (C. C.) 188 Fed. 712; McHarry v. Eatman, 29 Okl. 46, 116 Pac. 935; Nicholas v. Cornelius (Okl.) 152 Pac. 831; Hope v. Foley (Okl.) 157 Pac. 727.

The removal of all restrictions upon alienation included the release of control over the collection of royalties under the lease, after the death of the allottee, as the "royalties to accrue were a part of the estate remaining in the lessor." United States v. Noble, 237 U. S. 74–80, 35 Sup. Ct. 532, 535, 59 L. Ed. 844. While the royalties that had been collected and withheld by the Secretary of the Interior prior to the death of the lessor, were personal property (United States v. Noble, supra), the control of these funds was an incident of the power to approve of the lease; and, when Congress declared its purpose to allow the heirs of allottees to alienate the land free from all restrictions, we think it was the intention of Congress to dispense with further supervision by the Secretary of the Interior over the funds that had been collected under that power. In other words, Congress did not intend, in allowing the heirs of allottees to alienate their land free from all restrictions, subject only to the approval of the proper probate court, to leave the heir in the same position as the intestate was before his death. The legislation meant something. Neither did Congress intend to postpone the enjoyment of the estate by the heir until after he had sold it with the approval of the probate court, which would be the only way he could remove the only restriction left.

For these reasons the decree of the lower court is reversed, and the cause is remanded, with directions to enter a decree for complainants in accordance with this opinion.

STONE, Circuit Judge, dissents.

(245 Fed. 334)

CHICAGO & N. W. RY. CO. v. ZIEBARTH.

(Circuit Court of Appeals, Eighth Circuit. September 5, 1917.)

No. 4816.

1. LIMITATION OF ACTIONS ⟹34(1)—STATUTE—APPLICABILITY.
   The South Dakota statute of limitations (Code Civ. Proc. S. D. § 60), declaring that it includes an action on a liability created by statute, other than a penalty of forfeiture, applies to an action created by statute, though the liability is in the nature of a specialty.

2. COURTS ⟹375—FEDERAL COURT—STATE LIMITATION STATUTES.
   As the federal statutes, requiring a carrier to collect the full transportation charges provided in the authorized tariffs, contain no period of limitation, local limitation statutes, though varying, will govern the action; hence, in an action in the federal District Court for South Dakota for the amount of an undercharge, Code Civ. Proc. S. D. § 60, is applicable.

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3. COURTS ⟹375—FEDERAL COURT—STATE STATUTE OF LIMITATIONS.
Statutes of limitation being statutes of repose, an action by a carrier to recover the full charges authorized, brought in federal court under the commerce statute, is governed by local state statutes of limitation; the federal laws prescribing no limitations.

In Error to the District Court of the United States for the District of South Dakota; James D. Elliott, Judge.

Action by the Chicago & Northwestern Railway Company against M. J. Ziebarth. There was a judgment dismissing the complaint, and plaintiff brings error. Affirmed.

A. K. Gardner, of Huron, S. D., for plaintiff in error.

Caldwell & Caldwell, of Sioux Falls, S. D., for defendant in error.

Before HOOK, SMITH, and STONE, Circuit Judges.

STONE, Circuit Judge. This is an action by a carrier against a shipper for the amount of an undercharge on an interstate shipment. The case was presented upon the pleadings and an agreed statement of facts. The writ of error is from a judgment dismissing the complaint, as barred by limitation of the state statute.

[1] A single question of law is involved: Can a state statute of limitations operate to bar a recovery for an interstate freight undercharge? There is no controversy that the South Dakota statute of limitations is an effective bar to this action, if it is applicable. The railway company claims it does not apply for several reasons. It contends that "where the liability is created by positive provisions of statute, and not by the act of the parties, the statute of limitations cannot be pleaded." We do not know any reason for such a rule, and the authorities cited are not to that effect. They, and many others like them, follow the rule that liabilities in the nature of specialties do not come within the wording of the statute of King James nor those patterned thereafter. But that is merely a matter of the meaning and compass of the particular statute. The South Dakota statute here involved (Code of Civil Procedure of the State of South Dakota, § 60) goes further, and includes "an action upon a liability created by statute, other than a penalty of forfeiture." The liability here sought to be enforced is in the nature of a specialty since it finds its being in the statute. It would not come within the statute of King James, but the above-quoted South Dakota statute includes it.

[2] The company further contends that Congress did not intend the state statutes of limitation to apply to actions of this character, because such would destroy the uniformity at the basis of the commerce legislation, and because the collection of tariff undercharges is not simply a right given to the carrier, but a positive duty imposed upon it to collect and upon the shipper to pay such.

The claim of lack of uniformity, if state statutes of limitation were applied, is based upon the varying periods of limitation existing in the different states. The state statutes of limitation do differ as to the periods within which suits may be brought. The commerce statutes are almost dry of any attempt at limitation, and as to this character of cases

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entirely so. Therefore the choice is between state limitations and no limitations. Authority has decided that the state statutes apply. This court, in Murray v. Chicago & Northwestern Railway Co., 92 Fed. 868, 35 C. C. A. 62, decided the claim of a shipper for damages because of discriminatory rebates was barred by the state statute. In Ratican v. Terminal Railroad Ass'n (C. C.) 114 Fed. 666, Judge Adams, lately a very learned judge of this court, but then of the Circuit Court, decided the same point in the same way, saying:

"The Interstate Commerce Act prescribes no limitation of time within which actions based thereon shall be instituted. Such being the case, the statute of limitations of the state in which the action is brought must apply and control."

In Meeker & Co. v. Lehigh Valley R. R., 236 U. S. 412, 35 Sup. Ct. 328, 59 L. Ed. 644, Ann. Cas. 1916B, 691, which was by a shipper for reparation because of discriminatory and of extortionate charges falling within section 16 of the Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 384), as amended (Act June 29, 1906, c. 3591, § 5, 34 Stat. 590 [Comp. St. 1916, § 8584]), and controlled by the national statute in the nature of a limitation applying to suits by shippers, Mr. Justice Van Devanter clearly intimates the application of local statutes of limitation where the federal statute has not made provision. He says (236 U. S. 424, 35 Sup. Ct. 333, 59 L. Ed. 644, Ann. Cas. 1916B, 691):

"The words of the proviso make it certain that the amendment was to reach claims already accrued as well as those thereafter accruing. And while there doubtless was no purpose to revive claims then barred by local statutes, it is evident that Congress intended to take all other claims out of the operation of the varying laws of the several states and subject them to limitations of its own creation which would operate alike in all the states. * * * The proviso was in the nature of a saving clause, and while, as before observed, it probably was not intended to revive claims which were then barred by applicable local laws, we think there is no warrant for saying that it was not intended to include claims accrued more than two years before the amendment."

Nor is this expression weakened by the case of A. J. Phillips Co. v. Grand Trunk Western Railway Co., 236 U. S. 664, 35 Sup. Ct. 444, 59 L. Ed. 774, decided three weeks later, where the court had in view the same proviso of section 16. We therefore conclude that the contention based upon lack of uniformity cannot be sustained.

[3] As to the claim that the local statutes should not apply, because the collection and payment of tariff undercharges is not simply a right, but a duty: The foregoing cited cases are equally applicable and controlling in this connection, but possibly it may be useful to add some further observations. Without passing upon it, the concession may be made that the duty claimed does exist. That of itself reveals no reason why an action to enforce that duty should not be amenable to limitations. Even treason, aimed at the life itself of the nation, is expressly made subject to limitation. R. S. § 1043 (Comp. St. 1916, § 1707). And the penal clause of this very act has been held so confined in United States v. New York Central & H. R. R. Co. (C. C.) 157 Fed. 293, by Judge Hough, now a member of the Court of Appeals of the Second Circuit.

The reason for applying limitations to this, as well as to all other actions, lies in the nature and object of statutes of limitation. There

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should be distinguished a class of statutes which, in connection with a created right, prescribe a term within which it must be enforced. While such prescription is in form a special statute of limitation, it is often intended by the Legislature to have a more far-reaching influence. Where such intention is found by the courts, the term is not treated as a statute of limitation in the ordinary sense, but as an essential portion or element of the right itself. Phillips Co. v. Railway Co., 236 U. S. 662, 35 Sup. Ct. 444, 59 L. Ed. 774. But statutes of limitation, strictly speaking, are measures of repose. They are no part of any right, nor do they have at all in view any change of the legal liabilities in the litigation controlled by them. They leave the rights and liabilities of the parties untouched. In fact, their object is the proper protection of those rights and liabilities. They recognize that such rest upon facts which in very many instances are in dispute, and must, if brought for judicial settlement, be determined by evidence. Experience has left no doubt that lapse of time naturally, if not inevitably, results in loss of evidence pertinent to, and often decisive of, the existence of the facts in controversy, and that this is especially true where no warning (as by institution of litigation) has been given of any need for its prompt collection and preservation. To obviate this risk of loss, and consequent injustice, such statutes do not permit one who has in mind the judicial enforcement of a claimed right to remain watchfully or negligently in ambush until time has destroyed the defensive testimony of his opponent, and then begin his assault. They put into the hands of the one so slothfully attacked, as a personal privilege which may be urged or unused, the right to decline to enter a contest thus long delayed. They are beneficent in their purpose and effect. There is, therefore, ordinarily nothing in the nature of an action which should exempt it from limitation, if the Legislature controlling so wills.

It is true that courts, purely as a matter of statutory construction, have exempted the sovereign from statutes of limitation which did not clearly show an intention to include such. The historical reason for this attitude may be found in the very old maxim, "Nullum tempus occurit regi." Godb. 295; Hobart, 347; Gibson v. Chouteau, 13 Wall. (80 U. S.) 92, 20 L. Ed. 534. However, the sovereign may make itself subject to such statutes, as witness the statute limiting the time of bringing suit to annul land patents on the ground of fraud. Act March 3, 1891, c. 559, 26 Stat. 1093 (Comp. St. 1916, § 4992). But this case is not brought by the sovereign to protect some right attaching to sovereignty, and therefore cannot claim the benefit of the above rule.

The judgment is affirmed.

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(245 Fed. 388)

CHICAGO, B. & Q. R. CO. v. DAWSON et al. *

(Circuit Court of Appeals, Eighth Circuit. September 5, 1917.)

No. 4798.

1. JUDGMENT ⟹597—SPLITTING CAUSE OF ACTION—WHAT CONSTITUTES.
Plaintiffs' right of action as copartners, for destruction of their personal property by fire negligently set out by defendants' locomotive, is not identical with plaintiffs' right of action as tenants in common of varying interests, for injuries to their realty resulting from the same fire; and hence plaintiffs' recovery in an action for injuries to the realty will not, on the theory that they split a single cause of action, prevent subsequent recovery for destruction of their personalty.

2. JUDGMENT ⟹572(2)—CONCLUSIVENESS—WHAT CONSTITUTES.
Plaintiffs, who were copartners and tenants in common of varying interests owned realty, filed in the state court two suits for damages resulting from a fire negligently set out by defendant railroad company, one to recover for the destruction of the personal property, and the other for injuries to plaintiffs' realty. The action for destruction of personal property was removed to the federal court, and, the one for injuries to real property not being removed, plaintiffs had judgment for damages. After such judgment, plaintiffs sought to obviate the necessity of proof of the cause of the fire by amending their petition in the action for destruction of personalty, which was removed to the federal court. A demurrer was sustained to the amended petition, which alleged that the parties to the action in the state court were identical with those in the federal court, though the two causes of action were distinct; that the same fire and cause thereof, and defendants' liability, and the same facts, were involved, except the ownership and destruction of the personalty, and plaintiffs' damage; that such facts, aside from the exception, had become res judicata, and were binding by the judgment in the state court; and that defendant was estopped to deny the matters so determined. One of the grounds of the demurrer attacked the petition on the theory that plaintiffs, having split the single cause of action, could not recover a second judgment therefor. *Held*, that the sustaining of the demurrer to the amended petition was not a conclusive adjudication that a first cause of action had been split, but left plaintiffs free to file an amended petition.

3. APPEAL AND ERROR ⟹1002—REVIEW—VERDICT.
A verdict on conflicting evidence will not be disturbed on writ of error.

In Error to the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Action by Cecil Dawson and J. W. Settle, copartners as Dawson & Settle, against the Chicago, Burlington & Quincy Railroad Company. There was a judgment for plaintiffs, and defendant brings error. Affirmed.

M. G. Roberts, of St. Joseph, Mo., and George A. Mahan, of Hannibal, Mo. (O. M. Spencer, of St. Joseph, Mo., on the brief), for plaintiff in error.

Charles T. Hays, of Hannibal, Mo., and J. P. Boyd, of Paris, Mo. (Roy B. Meriwether, of Monroe City, Mo., and Berryman Henwood, of Hannibal, Mo., on the brief), for defendants in error.

Before CARLAND and STONE, Circuit Judges, and MUNGER, District Judge.

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*Rehearing denied November 7, 1917.

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STONE, Circuit Judge. Writ of error by defendants below from recovery of damages caused by burning of contents of blacksmith shop by fire alleged to have been started from passing locomotive.

Two suits were filed in the state court for damages occasioned by this fire. One for injury to the realty, for $2,990; the other, this action, for injury to personalty, for $15,000. The realty case, filed two days prior to this suit, resulted in judgment for the plaintiff, was appealed by the company, and since the submission of this case has been affirmed by the state Court of Appeals (193 S. W. 43). The present case was removed and tried after judgment in the state trial court in the other cause.

The railroad company here urges: (a) That the plaintiffs, having brought two actions for different elements of damage caused by the same fire, have fallen within the rule prohibiting splitting of causes of action, and therefore can recover only the amount sought and put in judgment in the realty case which was first filed and first tried; and, (b) that there was no substantial testimony that its locomotive caused the fire.

[1] (a) For the protection of litigants and of courts, the law wisely requires that there be sought in one suit all damages arising out of a single cause of action. To enforce this requirement but a single recovery is permitted, where only one cause of action exists. The test of a claimed violation of the rule is whether the suits are the same or different causes of action, and this is determined by legal identity or difference in the parties, the theory of liability, and the necessary evidence. The realty suit was brought by Cecil Dawson and J. W. Settle as tenants in common (undivided one-third and two-thirds) of a lot and building thereon, for destruction of the building; the instant suit was by the same persons as copartners conducting a blacksmith business in the above building for loss of partnership tools, machinery, equipment, and materials located therein. While the same individuals brought both actions, in each they appeared and based their right of recovery upon a stated legal status or relationship toward the burned property. That status was a material link in the pleading and the proof. It was different in the pleading, and each suit required proof which had nothing in common with the other in this respect. One was a tenancy in common in unequal parts of real estate; the other was partnership ownership in apparently equal portions. There is nothing in common, and therefore no identity in the two relationships. This conclusion is emphasized by another consideration. The judgment in the realty case was the individual property (one-third and two-thirds) of each of the plaintiffs, and might be subject to exemptions if levied on by judgment creditors of either of the plaintiffs; while the judgment in this case is partnership property, entitled to no exemptions. There is a failure of that identity of parties and proof necessary to identity of cause of action; hence no splitting of a single cause of action.

[2] The company contends that this point of the splitting of the cause of action had become res adjudicata through the sustenance of a demurrer to the first amended petition. After the judgment in the state trial court in the realty suit the plaintiffs sought to obviate proof

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in this case of the cause of the fire by amending their petition. This amendment, after describing the realty suit and the judgment therein, continued as follows:

"Plaintiffs state that the parties to said cause in said state courts are identically the same as the parties in this cause, but that said two causes of action are distinct; that the same fire, and the cause thereof, and defendant's liability therefor, and the same facts and issues there involved, save and except the ownership and destruction of the machinery, tools, equipments aforesaid, and the amount of plaintiffs' damage resulting from such destruction thereof, are involved in the case here at bar; that said facts and issues, aside from the exception aforesaid, have become and are res adjudicata and binding upon the parties herein by reason of said proceedings in said state court, that court having then and there full, complete, and general jurisdiction in that behalf of said parties and of said cause of action so determined as aforesaid; and that said defendant is by reason of the premises estopped to deny or in any manner controvert any of said facts and issues so determined as aforesaid in said state court, both of said causes of action depending upon identically the same evidence and proof, save as to the ownership of said tools, machinery, equipments, and materials and the amount of damages resulting from the destruction thereof."

To this petition defendant filed its demurrer upon five grounds, which may be summarized as insufficient statement of facts to constitute cause of action and split cause of action. This demurrer was sustained generally. Whereupon plaintiff filed a second amended petition, omitting all reference to the realty suit. To this petition defendant ultimately filed an amended answer, inter alia, pleading split cause of action, and, based upon the above demurrer ruling, res adjudicata. Plaintiffs replied, admitting filing and facts of realty suit, and saying:

"Admit that the parties to this cause are the same persons and corporation as the parties to the action for damage to the buildings tried in said Monroe court. But plaintiffs aver that they are suing herein in a different right, to wit, in joint right as equal copartners, from their several rights sued on in said other or appealed cause, and aver that this suit involves a different subject-matter, and involves as well a remedy which could not have been included in the other suit; and plaintiffs aver that said two causes of action are separate and distinct, that the said copartnership had no interest whatever in the subject-matter of said other suit, and that [his] suit involves certain issues not involved in the other."

Sustaining the demurrer to the first amended petition had no further office nor effect than declaring that pleading insufficient to support a cause of action. It left plaintiffs free to attempt another statement of their case. The ruling was not binding upon the trial court, and might have been departed from by it. In fact, if the basis of this ruling was split cause of action, it was so departed from, for the court refused to sustain a later motion for judgment on the pleadings as finally made up, although such motion and pleadings clearly presented the identical point. The demurrer ruling possessed none of these attributes of finality characterizing res adjudicata. Our conclusion is that there was no binding determination in the lower court that this suit was barred, because a single cause of action had been split, and that there was no such splitting of action.

[3] (b) Plaintiff in error urges that the record contains no substantial evidence that the fire was started by a locomotive, or that a loco-

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motive passed the burned property near enough the time the fire was discovered to have been the cause thereof. A careful examination of a voluminous record reveals a decided conflict in the testimony upon those points. The jury would have been amply justified in finding in favor of defendant, but we cannot say that there was not substantial testimony to the contrary.

The judgment is affirmed.

(245 Fed. 341)

C. B. NORTON JEWELRY CO. v. HINDS.

In re JONES.

(Circuit Court of Appeals, Eighth Circuit. September 5, 1917.)

No. 182.

1. BANKRUPTCY ⟹368—TRUSTEE—ALLOWANCES.
   Where it was apparent from the first that a sale by the trustee in bankruptcy of chattels held by the bankrupt subject to a mortgage would result in no balance over the lien for the benefit of the general estate, but would only foreclose the lien, the trustee is not entitled to commissions and expenses for making a sale of the property, though the mortgagee consented.
2. BANKRUPTCY ⟹368—TRUSTEE—ALLOWANCES.
   Under Bankruptcy Act July 1, 1898, c. 541, 30 Stat. 544, as amended by Act June 25, 1910, c. 412, 36 Stat. 838, which permits commissions to trustees on all moneys turned over to any person, including lienholders, a trustee in bankruptcy who sells chattels subject to a mortgage is not, where it was apparent that no surplus would result to the general estate, entitled to commissions, for it was not his duty to foreclose the mortgage, and the statute obviously was not intended to allow commissions in such case.
3. BANKRUPTCY ⟹272—RECEIVER—ALLOWANCES.
   Where a receiver in bankruptcy took possession of chattels subject to a mortgage, the amount of which exceeded their value, and the property was subsequently disposed of by the trustee, the trustee is entitled to allowances for taxes paid thereon and expenditures in preserving the property, for the receiver properly took possession of the property until the validity of the lien could be determined.

Petition to Revise Order of the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

In the matter of the bankruptcy of C. L. Jones. Petition by the C. B. Norton Jewelry Company to revise an order of the District Court authorizing allowances to K. F. Hinds, trustee in bankruptcy, from the proceeds of the sale by the trustee of property covered by petitioner's mortgage. Order revised and modified.

Samuel Feller, of Kansas City, Mo., for petitioner.

William Hatch Davis, of Muskogee, Okl., for respondent.

Before HOOK, SMITH, and STONE, Circuit Judges.

STONE, Circuit Judge. This case arises on a petition by a valid chattel mortgage lien creditor of a voluntary bankrupt to revise an order of the District Court permitting the proceeds from the sale by the

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trustee of property covered by the mortgage to be reduced by certain allowances in connection with the care and disposition of that property and with the general administration of the estate.

The undisputed facts are that the petitioner herein was the holder of a valid chattel mortgage, executed long prior to the adjudication in bankruptcy and covering certain fixtures and stock in a retail jewelry store; that in the schedule filed by the bankrupt were set forth the existence of this chattel mortgage, the amount of the then existing indebtedness thereunder, which was more than $2,000, and the estimated value of the security, which was placed at $1,500; that the bankruptcy petition was filed January 5, 1915; that January 22, 1915, the respondent was appointed receiver of the property; that February 3d a receiver's sale was ordered to be made, and was made February 12th; that February 13th, at the first meeting of the creditors, the respondent was elected and qualified as trustee; that upon that date this petitioner filed a petition of intervention, claiming the mortgaged property, and the earlier sale was set aside; that with full knowledge and consent of this petitioner a resale was made by the trustee on March 1, 1915, free from the claim of this lien.

The petitioner claims that it is entitled to the entire proceeds, $655, of the trustee's sale. The claim of the respondent, allowed by the order of the District Court, was that this amount should be reduced by $217.18. This latter sum was made up of three classes of items: Balance (after exhausting all other assets) of $94.93, expenses in administering the bankrupt estate; commission of $17.30, allowed the trustee on the sum ordered paid over to this petitioner; expenditures of $104.95, in connection with the preservation and care of the chattels covered by the mortgage, composed of $12.35 expenses of the receiver, $30 compensation of the receiver, and $62.60 taxes.

[1] The controversy is over the propriety of the allowance of the above items. In so far as the allowance for general expenses in the administration of the estate and for commission to the trustee are concerned, the case of In re Harralson, 179 Fed. 490, 103 C. C. A. 70, 29 L. R. A. (N. S.) 737, decided in this court, is controlling. In that case the court refused to allow for commissions and expenses of a trustee in making sale of mortgaged property, deciding in effect that, as it was apparent from the first that there would be no balance over the lien for the benefit of the general estate, the bankruptcy official should not, as such, have taken steps which could have but the single result of enforcing the lien with no benefit to the estate. To the insistence of counsel that the present case is distinguishable upon the ground that the sale was here consented to, it may be said that in the Harralson Case the sale was in accordance with a stipulation and petition in which the claimant joined.

[2] Nor was, as urged by respondent, the amendment of 1910 (36 Stat. 838, 840), which permits commissions to trustees on all moneys turned over to any person, including lienholders, intended to cover payment of proceeds from sales of property which should not have been disposed of by the trustee, but should have been turned over to the lienholder. The principle which denied repayment of actual expenses

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incurred by the trustee in sale of the lien property in the Harralson Case was that it was no part of the duty of the trustee to sell the lien property, with or without the consent of the lienholder, when there could be no benefit to the estate. When he acted outside the scope of his office, he could not make any claim at all as a trustee. We think the reasoning of that case sound, and do not believe Congress intended by the 1910 amendment to permit trustees to charge a compensation for performing acts outside their duties as such.

[3] It was found to be necessary for the preservation of this property that a receiver be appointed to take charge of it before the selection of a trustee. Under the circumstances this was a proper step until the validity of the lien revealed in the bankrupt's schedule could be properly determined. It was as much for the benefit of the mortgagee as for that of the bankrupt's general estate. Expenditures necessitated by such receivership do not come within the decision or reasoning of the Harralson Case, and should be allowed. They here consist of compensation of the receiver, $30, and expenses, such as invoicing, appraising, and incidentals in connection with the receivership, amounting to $12.35. Both of these sums, under the meager evidence, seem proper in amount. To this should be added $62.60 taxes paid on this particular property.

Our conclusion is that the order should be revised, to the effect that the trustee be directed to pay over to the petitioner the sum of $550.05, which is the sale proceeds less the above receivership items and taxes; and it is so ordered.

(245 Fed. 343)

CONTINENTAL GIN CO. v. STOCKER et al.

(Circuit Court of Appeals, Eighth Circuit. July 23, 1917.)

No. 4867.

PRINCIPAL AND SURETY ⟹161—ACTION ON NOTES—DEFENSES BY SURETY.

Evidence *held* insufficient to sustain the defense by sureties on promissory notes that the payee agreed to apply the proceeds of a mortgage given by the principal, if sold on foreclosure, on such notes, in preference to other notes of the series.

In Error to the District Court of the United States for the Eastern District of Oklahoma; Martin J. Wade, Judge.

Action at law by the Continental Gin Company against W. D. Stocker and J. Oscar Howard. Judgment for defendants, and plaintiff brings error. Reversed.

For opinion of lower court, see 235 Fed. 1005.

J. L. Hull, of Muskogee, Okl. (N. A. Gibson and T. L. Gibson, both of Muskogee, Okl., on the brief), for plaintiff in error.

Malcolm E. Rosser, of Muskogee, Okl. (Geo. S. Ramsey, of Muskogee, Okl., and Edgar A. De Meules and Villard Martin, both of Tulsa, Okl., on the brief), for defendants in error.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

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CARLAND, Circuit Judge. The Gin Company, hereafter called the plaintiff, sued Stocker and Howard, hereafter called defendants, on two promissory notes, dated September 6, 1911, for the sum of $1,550 each. The defendants pleaded in defense that the notes sued on were the first two of a series of four notes for the same amount given for the purchase price of a gin sold by the plaintiff to the Farmers' & Merchants' Gin Company of Stigler, Okl.; that defendants signed said notes as sureties only, and before said notes were signed one J. D. Ray, while acting as the agent of the plaintiff in making the sale of the gin, orally promised and agreed with the defendants that, in case default should be made in the payment of the notes given by the Farmers' & Merchants' Gin Company and the mortgage given to secure the purchase price of the gin should be foreclosed, the proceeds of the foreclosure sale would be first applied to the payment of the two notes sued upon in this action; that, notwithstanding this agreement, the mortgage given to the plaintiff by the Farmers' & Merchants' Gin Company upon the gin was foreclosed prior to the present suit, and all the proceeds of the sale applied upon the last two notes of the series of four which defendants did not sign. It was further alleged that the proceeds of the mortgage foreclosure would have fully satisfied the notes sued on in the present action, and therefore defendants prayed that the suit be dismissed. The case came on for trial, and, as the execution and delivery of the notes were admitted, the defendants assumed the burden of establishing their defense.

Evidence was introduced upon the question of whether any contract, as alleged, was ever made between the defendants and the plaintiff, through its agent, J. D. Ray, and upon the question as to whether said J. D. Ray had apparent authority from his principal to make the contract pleaded; it being conceded or undisputed that he had no actual authority to do so. It appeared from the evidence that the mortgage upon the gin had been foreclosed, and that the sum realized therefrom by the plaintiff after the payment of prior liens and costs was $2,713.30, which had been applied upon the two notes last becoming due in the series of four. Under the charge of the court the jury allowed this last-named sum as a credit upon the amount due upon the notes sued upon. The plaintiff sued out a writ of error from the judgment entered on the verdict.

Numerous errors have been assigned; but we have found it necessary to consider but one assignment of error, and that is the one which alleges that the court erred in refusing to direct a verdict for the plaintiff for the full amount due upon the notes. There is an interesting discussion of the validity and nature of such a contract as is pleaded in defense contained in the briefs of counsel, and also upon the question as to whether oral evidence was competent to vary the written contract of the parties entered into at the time of the purchase and sale of the gin.

A careful consideration of the evidence, however, has convinced us that there was not sufficient evidence of a contract, such as is pleaded by the defendants, to warrant the court in submitting that question to the jury. The following is all the evidence in the record bearing upon

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the question of whether there was a contract. Mr. Howard, one of the defendants, being upon the witness stand, was asked by his counsel the following question:

"Q. Proceed; go ahead, and state what Mr. Ray said to you. A. Mr. Ray said, 'Go ahead and sign the notes;' that if the—the purchase price would be taken out of the earnings, and if it was sold before the purchase price would be put on the two first notes, and after the thing was about over with I turned around and said to Mr. Ray, 'If you don't do this and agree to do this'— He says, 'I will take good care of you; I have a good credit with the Continental Gin Company and I can manage them as long as I want to.' I wouldn't have signed the note, if that hadn't been the agreement."

The defendant Stocker, while upon the stand, testified that Ray said that defendants "were taking no chances in indorsing; that the property would take care of those two notes, and they would be paid first; that the only chances we were taking that some unforeseen catastrophe would wipe the whole thing out." The witness Stocker was again asked the following question:

"Now, you stated a while ago, Mr. Stocker, that Mr. Ray told you that if you signed these notes that you would not run any risk, except in case of catastrophe, because the proceeds of the property would be applied first to them? A. Yes, sir; and also the earnings of the company, earnings of the gin company; he and Mr. Holcomb were the gin company."

This is all the evidence in the record tending to show a contract between Ray, as the agent of the plaintiff, and the defendants that the proceeds of the mortgage foreclosure, if the mortgage should be foreclosed, would be applied to the payment of the notes in suit. Manifestly, the evidence is not such upon which a jury would be authorized to find a verdict that there was such a contract. The last question put by counsel assumes that the witness had stated something which he did not state, and in answering the question the witness stated that Ray had said that the notes would also be paid from the earnings of the company. As to the contract, therefore, the evidence was to this effect. Howard testified that Ray said:

"The purchase price would be taken out of the earnings, and, if it [the gin] was sold before, the purchase price would be put on the two first notes."

Stocker testified that Ray said:

"The property and earnings of the company would take care of the notes, and they would be first paid."

The words "purchase price" refer to the price paid by the gin company. We are clearly of the opinion that a verdict against the plaintiff on the question of contract based upon such evidence ought not to be allowed to stand, and therefore it was the duty of the trial court to have directed a verdict as requested. For this error the judgment below must be reversed, and a new trial ordered.

We might rest the case here; but, in view of the fact that there is to be a new trial, we think it is proper to say that in our opinion there is no evidence in the record that would sustain a verdict by the jury that Ray had apparent authority to make the contract pleaded.

Judgment reversed, and a new trial ordered.

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(245 Fed. 346)

ROYAL INDEMNITY CO. v. BEISEKER.

(Circuit Court of Appeals, Eighth Circuit. September 5, 1917.)

No. 4817.

1. PAYMENT ⚷21—ACCEPTANCE OF CHECK—EFFECT.

Where defendant, which executed an indemnity bond securing to plaintiff payment of three certificates of deposit issued to him by a bank, refused to renew its bond, and plaintiff, seeking to collect the certificates of deposit, received from the bank a draft, the draft cannot be treated as having been accepted in payment, for the accepting of a check or draft in payment of an indebtedness in some other form does not operate as an extinguishment of the indebtedness, unless it appears that such was the intention of the parties, and plaintiff obviously would not accept a draft in payment of a certificate of deposit, where the surety would not renew its obligation.

2. PRINCIPAL AND SURETY ⚷121—LIABILITY OF SURETY—NEGLIGENCE.

Where plaintiff, who held certificates of deposit issued by a Washington bank and guaranteed by defendant, on being notified that defendant would not renew its bond, deposited them with his local bank for collection, and such bank transmitted them to a metropolitan Minnesota bank, which bank sent them to the Washington bank for payment, and the Washington bank, after an exchange of telegrams on July 2d, sent the Minnesota bank a draft on a Seattle trust company in payment, which draft, being received by the Minnesota bank on July 6th, was forwarded to Seattle, where it arrived and was presented on July 9th, there was no negligent delay in presenting the draft for payment.

3. PRINCIPAL AND SURETY ⚷121—ACTIONS—NEGLIGENCE.

Where defendant executed an indemnity bond securing to plaintiff payment of certificates of deposit issued by a bank, and plaintiff, on being notified that defendant would not renew the bond for another year, deposited for collection the certificates of deposit with a local bank, at his place of residence, the fact that plaintiff or his agents were guilty of negligence in presenting for payment a draft given by the bank issuing the certificates will not preclude recovery on the bond, where the bank, payment of whose certificates defendant guaranteed, had no intention of paying them, and would at any time have stopped payment on the draft, for the delay, though negligent did not injure defendant.

In Error to the District Court of the United States for the District of North Dakota; Robert E. Lewis, Judge.

Action by A. N. Beiseker against the Royal Indemnity Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

George S. Grimes, of Minneapolis, Minn., and Joseph J. Youngblood, of Fessenden, N. D., for plaintiff in error.

John O. Hanchett and Aloys Wartner, both of Harvey, N. D., for defendant in error.

Before HOOK, SMITH, and STONE, Circuit Judges.

STONE, Circuit Judge. From a recovery on an indemnity bond securing to Beiseker payment of three certificates of deposit issued to him by the First International Bank of South Bend, Wash., the company sues its writ of error.

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The loss is undisputed, but the company challenges liability on the grounds: (a) That the bank paid the certificates covered by the bond with a draft which was accepted in payment, and the loss is really for dishonor of the draft which is not covered by the bond; (b) negligent delay in and careless method of presentation of the certificates for payment.

[1] (a) The acceptance of a check or draft in payment of an indebtedness in some other form does not operate as an extinguishment of that indebtedness, unless it appears that such was the intention of the parties. Beiseker was having these certificates cashed at this time, as the evidence shows, solely because the company would not renew its bond and the bank could secure no substitute indemnity. It is not, therefore, to be believed that he would take the bank's draft with the intention of having it operate as an extinguishment of the certificates and a consequent loss of the security of this bond, nor could the bank or the indemnity company have so understood his actions.

[2, 3] (b) As to the urged point of negligence in presenting the draft, the question is one of law on undisputed facts. Beiseker, living at Harvey, N. D., for cash took out the three certificates from the First International Bank of South Bend, Wash. The bond provided for payment of the certificates by the bank "until June 11, 1915." From June 5th to June 14th there was correspondence by letter and wire between the indemnity company and Beiseker as to whether the company intended to renew its bond. Upon the last date the company definitely wired Beiseker that it would not renew. No complaint was urged on argument as to any omission to act prior to June 14th. The next day Beiseker deposited the certificates in a local bank at Harvey for collection, with directions to send them direct to the First International for payment. The same day this bank sent them to its correspondent at Minneapolis, with similar instructions, and with the request to wire in case of nonpayment. The Minneapolis bank, the day it received the certificates, forwarded them directly to the First International for payment, where they arrived June 19th or 20th. Receiving no answer, the Minneapolis bank wired the First International June 25th, receiving favorable answer June 28th. July 2d the First International sent draft in full on a Seattle, Wash., trust company to the Minneapolis bank, which received it July 6th, and that day forwarded it to Seattle, where it arrived July 9th. On this last date the cashier of the First International appeared in person and notified the trust company not to pay the draft. No negligence is shown by the above-outlined course of dealing.

But the existence or nonexistence of negligence is not decisive in this case. It is highly questionable whether negligence on the obligee's part is any defense to an insurance contract, unless it be expressed or clearly implied in the terms of the bond. However this may be, negligence cannot be a defense, unless its absence would have prevented the loss. Here it is conceded that the bank was just as financially able to pay the draft July 9th as it would have been to pay the certificates upon June 11th or 14th, or any intervening date. It is very clear that the bank had no intention of paying them at any of these times. It hoped

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to get renewed security, and thereby the extension of the certificates, and it obstructed and delayed taking an open stand until it ascertained, July 8th or 9th, that the bond could not be made, when it ordered the dishonor of the draft. In short, the time and method of presentation of the certificates had no effect whatever on their nonpayment.

The judgment is affirmed.

(245 Fed. 348)

TREADWELL v. CORKER & SMITH.

(Circuit Court of Appeals, Fifth Circuit. October 9, 1917.)

No. 3086.

APPEAL AND ERROR ⟹78(3)—DECISIONS REVIEWABLE—FINAL JUDGMENT—"FINAL DECISION."

Where defendant, in an action to recover a sum claimed under a contract, filed a plea denying the indebtedness, and also a plea in recoupment, seeking to recover an amount greater than that claimed by plaintiff, an order sustaining a demurrer to the plea in recoupment is not, as it did not dispose of all of the issues raised by the pleadings, a "final decision" within Judicial Code (Act March 3, 1911, c. 231) § 128, 36 Stat. 1133 (Comp. St. 1916, § 1120), declaring that the Circuit Court of Appeals shall exercise appellate jurisdiction to review final decisions in the District Court, and hence a writ of error to review the order sustaining the demurrer will be dismissed.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Final Decision.]

In Error to the District Court of the United States for the Northern District of Georgia; William T. Newman, Judge.

Action by Corker & Smith against A. P. Treadwell. There was a judgment for plaintiff, and defendant brings error. Writ dismissed.

Henry B. Troutman and L. C. Hopkins, both of Atlanta, Ga., for plaintiff in error.

Owens Johnson, of Atlanta, Ga. (Thos. B. Felder, of Atlanta, Ga., on the brief), for defendant in error.

Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

PER CURIAM. This was an action by the defendants in error (hereinafter referred to as the plaintiffs) against the plaintiff in error (hereinafter referred to as the defendant) to recover an amount claimed to be due under an alleged contract. To the plaintiff's petition the defendant interposed a plea denying the alleged indebtedness, and also a plea of recoupment seeking to recover of the plaintiff an amount greater than that claimed in the plaintiff's petition. The plaintiff demurred to the last-mentioned special plea as it was amended.

With reference to this demurrer the record shows that the court "ordered that the demurrer be and it is hereby sustained." Other than the quoted order, the record does not show any disposition of the issues raised by the pleadings in the case. So far as appears from the record,

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the case stands at issue in the District Court, and the whole of it has not been finally determined by that court. We are of opinion that the order mentioned is not such a final decision as is required to support a writ of error. Judicial Code U. S. § 128; La Bourgogne, 210 U. S. 95, 28 Sup. Ct. 664, 52 L. Ed. 973; Webster Coal & Coke Co. v. Cassatt, 207 U. S. 181, 28 Sup. Ct. 108, 52 L. Ed. 160; Bank of Rondout v. Smith, 156 U. S. 330, 15 Sup. Ct. 358, 39 L. Ed. 441; Kingman v. Western Mfg. Co., 170 U. S. 675, 18 Sup. Ct. 786, 42 L. Ed. 1192; Maas v. Lonstorf, 166 Fed. 41, 91 C. C. A. 627.

The writ of error is dismissed, without prejudice to the right of the defendant to have an appellate review of the ruling complained of, after a final decision of the case.

(245 Fed. 349)

NASH et al. v. MINER.

(Circuit Court of Appeals, Seventh Circuit. December 7, 1916. Rehearing Denied April 10, 1917.)

No. 2352.

PATENTS ⟹328—VALIDITY AND INFRINGEMENT—DRAFT RIGGING FOR RAILWAY CARS.

The Miner Patent, No. 758,677, the O'Connor patent, No. 829,728, and the Nash patent, No. 858,746, each relating to draft-rigging for railway cars, *held* not infringed, conceding their validity.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit in equity by William H. Miner against Charles J. Nash and the Universal Draft Gear Attachment Company. Decree for complainant, and defendants appeal. Reversed.

Louis K. Gillson, of Chicago, Ill., for appellants.
George I. Haight, of Chicago, Ill., for appellee.

Before KOHLSAAT, MACK, and ALSCHULER, Circuit Judges.

KOHLSAAT, Circuit Judge. The matters here in dispute pertain to what is termed a tandem draft-rigging in relation to car couplers. Because of the limited space between draft-sills, within which space draft-rigging must be mounted, it has been found desirable, if not necessary, to provide for the increased strain upon shock-absorbing elements growing out of the tendency to enlarged car equipment, to at least double the efficiency of former devices, by arranging the draft-rigging in tandem rather than abreast of each other. Of necessity the great strain of the heavier train calls for increased strength in all the parts pertaining to the coupling of cars. To keep up with the demands thus growing out of the enlarged car equipment and make reasonable provision for the safety and duration of the coupling devices, all within the same space utilized for that purpose when

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the requirements were lighter, has invoked the genius and skill of many inventors—among others, appellee Miner, who seems to have been fertile in attempts to meet the situation. He is unable to say that he has not secured over a hundred patents to that end.

The present suit is based upon three patents, viz.: Claims 17 and 18 of patent No. 758,677, granted to Miner May 3, 1904, for a tandem draft-rigging for railway cars—reading as follows, viz.:

17. In a draft-rigging, the combination with a stop-casting having a lower flanged portion furnished with open slots to receive connecting-bolts, of a removable follower-supporting plate and short connecting-bolts securing the same to the stop-casting, substantially as specified.

18. In a draft-rigging, the combination with a stop-casting having at its middle portion a lower flange provided with a transverse slot to receive a connecting-bolt, of a removable follower-supporting plate and short connecting-bolts securing the same to the stop-castings, substantially as specified.

Claims 2, 4, 5, and 6 of patent No. 829,728, granted to J. F. O'Connor August 28, 1906, for draft-rigging for railway cars, reading as follows, viz.:

2. A railway draft-rigging side-plate or stop-casting, consisting of a cast web of substantially uniform thickness, free from T and other flange-like sections, and having upright convolutions therein forming stops or shoulders for the followers to abut against, substantially as specified.

4. A railway draft-rigging side plate or stop-casting, comprising a cast-metal web of substantially uniform thickness throughout, free from T and other flange-like sections, and having a plurality of upright convolutions therein forming stops or shoulders for the followers to abut against, and provided with further upright convolutions therein forming intermediate stops or shoulders for the followers to abut against to limit the compression of the springs, substantially as specified.

5. In a draft-rigging for railway-cars, the combination with the draw-bar, springs and followers, of side plates or stop-castings each consisting of a cast web of substantially uniform thickness throughout, having integral upright bends or convolutions therein forming upright stop-shoulders, and having also horizontal convolutions forming longitudinal strengthening ribs or flanges, said horizontal convolutions extending between but not across said upright convolutions, substantially as specified.

6. In a railway draft-rigging side-plate or stop-casting, consisting of a cast web of substantially uniform thickness throughout, furnished with a series of upright convolutions therein forming stops or shoulders for the followers to abut against, and furnished with horizontal or longitudinal convolutions therein forming longitudinal strengthening ribs or flanges, said horizontal convolutions extending between but not across said upright convolutions, substantially as specified.

And all the claims of patent No. 858,746, granted to C. J. Nash for draft-rigging for railway cars July 2, 1907. So far as deemed necessary for the purposes of this suit, claim 1 is representative of the invention claimed by the patent. It reads as follows, viz.:

In a railway draft-rigging, the combination with the draw-bar, springs and followers, of side-plates or stop-castings each consisting of a main cast web, having upright open bends therein forming the main stops for the followers to abut against, and having hollow intermediate stops, the double upright walls of which strengthen and stiffen against buffing said main web at the intermediate portions of the stop-casting between the followers or main stops, and at the same time prevent abnormal thickness or body of metal at such intermediate portions, substantially as specified.

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All of which patents are owned by Miner.

Claims 17 and 18 aforesaid involve the use of slotted as distinguished from round bolt-holes for receiving the bolts which secure the lower flange of the stop-casting to the so-called follower-plate, to the stop-casting and to the supporting plates. These follower-supporting plates are removable. In order to get at and repair, replace, or adjust the springs, yoke, and other portions of the draft-rigging when necessary, it is important that these supporting plates be removed with as little difficulty as possible. Miner hit upon the slotted bolt-holes and short bolts. These slotted bolt-holes are old—very old in some arts. They seem also to have been used in prior art draw gear for railway cars—see patent to C. H. Starr, No. 382,-840, granted May 15, 1888, where the slotted bolt-hole is used to receive the bolts which hold the draw-spring cage in place; and Hoey patent, No. 593,097, granted November 2, 1897, for draft-beam attachment for railway cars, where the slotted bolt-hole is used for the reception of the stirrup bolts; and the Turnipseed and Williams patent, No. 691,085, for means for attaching draft timbers to the draft-sills of freight cars, where it is used for the reception of bolts *E* which carry the draft-plates *B*.

It does not appear that slotted bolt-holes had ever been used in the exact combination of claims 17 and 18, although Starr accomplished the same end Miner did, viz., he thereby avoided the necessity of tearing up the car floor. Starr was providing for a single draft-gear. The use of the slotted bolt hole does not seem to have been indispensable to the use of appellee's short bolt, there being ample clearance for the use of round holes. Both the short bolt and the slotted bolt hole are used for the same purpose and in the same way as in the prior art. They furnished a more convenient method for removing and replacing the several elements of the draft-rigging device.

The claims of the O'Connor patent in suit pertain to the side-plate or stop-casting of a railway draft-rigging. This is usually made of malleable iron or other annealed metal. On its web are the stops or shoulders against which the spring followers abut. The side plate of the patent is described in the specification as being of uniform thickness at all points,

"so that the stop-casting as a whole will be entirely free from T or other sections which would result in giving the casting a greater thickness or body of metal at some points than others, with the consequent imperfections, casting strains and defects which have heretofore been incident to the making of side-plates or stop-castings of the old constructions wherein the stops or shoulders from right-angle or T sections with the main plate or web of the casting."

It is the claim of the patent that variations in the thickness of the wall of the convolutions constituting the stops or shoulders are productive of defective castings by reason of the more rapid cooling off of the thinner portions and the tendency of the metal to be injured by one part cooling off after the rest had become cool. O'Connor sought to remedy this without weakening the shoulders. Formerly, it seems, the casting had to be chilled at its thickest points. O'Con-

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nor claims to have made this unnecessary by his uniform web. It will be observed that claims 5 and 6 do not specifically mention the elimination of T sections from the castings. No other method of procuring uniform thickness is designated in the specification. Indeed, no casting could accomplish that end and still have the T section. We deem the language of claims 5 and 6 as contemplating freedom from T sections. Nor was the production of convolutions on the web, upright or horizontal, new. Side-plates in which there were raised shoulders and other convolutions, disclosing no T sections, may for the purposes of this suit be conceded to be new. Though Harvey patent, No. 447,323, seems to have gone far toward the accomplishing of this result as early as 1891, and others had claimed to have eliminated T sections in their castings, prior to O'Connor, O'Connor accomplished his purpose by making the stop shoulders, the intermediate stops and the longitudinal strengthening ribs three-sided or hollow.

The idea of O'Connor was to provide a plate which should avoid weaknesses incident to the casting process. He did not undertake to produce new features or functions into draft plates. He disclosed no new relation or operation between the spring followers and the bosses on the cheek plates, nor any new arrangement of the several parts of the draft-gear as such. Except for their tendency to become damaged in the casting process, the side castings theretofore in use were just as usable in draft-gears as those made under the O'Connor patent.

In the view we take of the matter, it is unnecessary to pursue this question further. The Nash patent in suit, the specification says, is related "more particularly to improvements in the construction of the side-plates or stop-castings of the draft-rigging." "Railway draft-rigging stop-castings," the specification proceeds,

"are subjected in practical use to enormous blows, shocks, or strains, and great difficulty is experienced from the draft rigging breaking or giving away at the stop-castings or the shoulders thereon against which the followers abut, and in so designing the side-plate or stop-casting that it will afford the necessary stops or shoulders for the followers to abut against, and at the same time be of a form capable of being so cast as to produce homogeneous and perfect castings, free from casting strains or other defects incident to unequal distribution of metal and varying thicknesses in different parts of the casting, which is ordinarily required to be of considerable length and with a straight flat face to fit against the draft timber or sill of the car, and with the necessary bolt holes or bosses for engagement therewith, and at the same time to possess the necessary strength and stiffness against bending or buckling at the intermediate portions of the casting between the followers of the draft-rigging.

"The object of my invention is to provide a draft-rigging side-plate or stop-casting, by means of which the difficulties or objections heretofore experienced may be practically overcome or obviated.

"My invention consists in the means I employ to practically accomplish this object or result, as herein shown and described and more particularly specified in the claims."

The patent further sets out that:

"Each of the side-plates or stop-castings *B* is further provided with intermediate stops or shoulders b^5 to limit the compression of the springs, and the in-

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termediate stops b^5 are made hollow, or with double upright walls b^6 and b^7, so that this intermediate portion of the stop-casting between the followers may be adequately strengthened against buffing or other blows, while at the same time the unequal distribution of metal in the casting at this part will be avoided, and the web of the casting maintained of substantial uniform thickness throughout. The inner wall b^6 of the hollow intermediate stop b^5 is furnished with a bolt-hole or opening b^8 through which the bolt F connecting the stop-casting with the draft timber or sill may be inserted, and the back or outer wall b^7 of the hollow stop b^5 is furnished with a boss or projection b^9 to enter a suitable notch or mortise in the draft timber or sill A, and thus relieve the connecting bolts F in part from strain. Each of the side-plates or stop-castings B is further provided with an integral upright and flange b^{10} at each end, and with an integral upper guide flange b^{11} to guide the followers, and with a removable lower or bottom guide G which is removably connected to the side-plate or stop-casting by bolts g, which fit in slots b^{12} in the bottom lugs b^{13} of the stop-casting at the lower ends of the main stops b b^1 b^2. Each of the side-plates or stop-castings may also preferably be furnished with depressions b^{14}, reducing the thickness of the main web B^1 at certain parts, where it can be done without detriment, and thereby lessening the weight of the casting as a whole. The upright end flanges b^{10} of the stop-casting are connected to the front and rear stops respectively by horizontal connecting ribs b^{15}.

"By means of the hollow intermediate or spring compression limiting stops, in connection with the open bend or convolution main stops, my new draft-rigging side-plate or stop-casting is adequately stiffened or reinforced against buckling at the intermediate portions thereof between the followers or the main stops, while at the same time the casting is made of a shape such that the metal is evenly distributed and the casting freed from abnormal thicknesses or bodies of metal at different portions of its length, so that in the practical production of the same there is little liability for production of casting strains or warping due to the unequal cooling and contraction at different parts, and defects incident thereto."

The end sought by the patentee was the strengthening of the main stops and the portions of the web of the stop-castings, intermediate the main stops. Nash's original claim 3 called for "a draft-rigging side-plate or stop-casting having main stops and hollow intermediate stops," etc. This claim was disallowed on one of Miner's and on O'Connor's prior patent. Nash then amended by adding the words "with front and back upright walls"—constituting his present claim 3. A further advantage claimed was the limiting of the compression of the springs and serving as a guide thereto laterally. All this was to be accomplished without undue thickness of metal. The peculiar feature of the patent consists in what are termed the double upright walls, consisting of six walls inclosing a hollow cube. The inner wall or face of this stop serves as a guide to the springs, preventing buckling. The stop must under the patent be an inclosed structure, at least substantially. It is appellee's contention that the alleged infringing device, while lacking a face wall next to the springs, yet contains the substance of the Nash patent. With this position we do not agree.

Appellants' device, alleged to infringe the Nash patent, and more particularly the intermediate stop thereof, has five walls only. The web forms the base wall, while the four flanges rising perpendicularly from the web form the four sides. The side wall opposite the base is missing. All of the Nash claims call for the six-sided intermediate stop.

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We find that the Miner patent in suit discloses no invention as to the elements thereof employed in the appellants' device. There is no new use of the slotted bolt-holes. We therefore hold that patent, even if valid, not infringed by appellants. If there be anything new in the O'Connor patent, a question we do not pass on, we find that as to such matter appellants do not infringe the patent. They do not manufacture a draft-rigging draft-plate of uniform thickness, nor do they otherwise trespass upon appellee's monopoly therein. With reference to the Nash patent, as above stated, appellants have no intermediate stops "having front and back upright walls." In view of Nash's assignment to Miner, we do not pass upon the validity of the latter patent.

There seems to be considerable confusion as to just what patents the parts alleged to be infringed are taken from, in view of the vast number of patents in the prior art. We do not deem it important to decide this. After a careful consideration of all these, so far as shown in the record, we are satisfied that, while appellee's device is one which seems to appeal to the railroads as suitable and convenient, those features of it which appellants use are old. No amount of convenience, availability, and popularity can overcome the absence of invention It is the province of mechanical skill to bring to invention effectiveness, which is second only in importance in the advance of science to invention itself. In the present case one may easily get the two confused. We are clear, however, that for the reasons stated, infringement is not established.

The decree of the District Court is reversed, with direction to dismiss the bill for want of equity.

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(245 Fed. 385)

WHITEHEAD et al. v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. October 4, 1917.)

No. 2942.

1. POST OFFICE ⟹48(4)—USE OF MAILS TO DEFRAUD—INDICTMENT—DESCRIBING FRAUD.

Indictment under Pen. Code (Act March 4, 1909, c. 321) § 215, 35 Stat. 1130 (Comp. St. 1916, § 10385), for the use of the mails to defraud, need not state the fraud with the technical details required when swindling or a like crime is the subject of an indictment; a fraudulent design, while essential, being only an element of the crime, and the gist thereof being the use of the mails, though not necessarily with the result of consummating the design.

2. POST OFFICE ⟹48(4)—USE OF MAILS TO DEFRAUD—INDICTMENT—NEGATIONS.

The quoted language of the indictment for fraudulent use of the mails, charging that the scheme involved the misleading and deceiving of the person into the belief that he would, after a stated period, become entitled to and receive a loan, "when in truth and in fact" (1) "the loan or reserve fund would not be sufficient to provide said loan for said contract holder in said period of ——— months"; (2) "and that he could not and would not, at the expiration of said time, receive said loan"; or (3) "it was altogether uncertain whether said contract holder would, at the expiration of said period of time, be able to obtain said loan on offering said security"—is intended to and does indicate wherein and how the scheme devised was fraudulent, and satisfactorily supplies a necessary element in the description of the device, and is not open to objection of constituting negations which are negative pregnants, conjunctive negations, and literal negations, and therefore void.

3. POST OFFICE ⟹48(4)—USE OF MAILS TO DEFRAUD—INDICTMENT—DE MINIMIS.

The indictment for using the mails to defraud, alleging that the contract holder was fraudulently misled into the belief that the contract provided that he could secure a loan in six months, and negativing such an effect for it, need not allege that he could not get his loan in a greater period, to escape the rule of de minimis.

4. POST OFFICE ⟹48(4)—USE OF MAILS TO DEFRAUD—INDICTMENT—QUALITY OF SCHEME.

Ordinarily, at least, an indictment for using the mails to defraud is not subject to demurrer on the ground that the scheme is not apparently adapted to the accomplishment of the crime intended to be committed, but the quality of the scheme is for the jury; and such is the case where the scheme has the appearance of legality, is embellished with the legal phraseology and formality efficacious in concealing consequences and creating confidence, uses language excellently conceived to mean one thing and create the impression that it means something else, and important provisions, expressed in obscure language, are inconspicuously printed in small type on the back of the signed contract.

5. POST OFFICE ⟹48(4)—USE OF MAILS TO DEFRAUD—INDICTMENT—DESCRIBING FRAUD.

The indictment for using the mails to defraud, in describing the fraudulent scheme, need not mention all the auxiliary devices, and so, though the contract used recites that an application is a part of it, the indictment need not set forth the application, which does not change the legal effect of the contract.

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6. POST OFFICE ⟹48(4)—USING MAILS TO DEFRAUD—INDICTMENT.

There is no conflict between "tenor" and "in substance," in an indictment for fraudulent use of the mails, introducing a contract with the words, "a contract of tenor in substance as follows," but "in substance" modifies "tenor," and indicates that the contract is substantially as set forth.

7. CRIMINAL LAW ⟹1186(4)—HARMLESS ERROR—INDICTMENT—IMPERFECTIONS IN FORM.

Rev. St. § 1025 (Comp. St. 1916, § 1691), providing that an indictment presented in federal court is not to be deemed insufficient because of any defect or imperfection in matter of form only, which shall not tend to the prejudice of defendant, authorizes observance of the dictates of common sense.

8. POST OFFICE ⟹49—USE OF MAILS TO DEFRAUD—CHARACTER OF TRANSACTIONS—EVIDENCE.

The circumstances in evidence on prosecution for use of the mails to defraud, the terms of the contract, the character of the advertising, the conduct of agents of the company, and correspondence between the company and persons misled by the agents *held* sufficient to establish the fraudulent character of the transactions, intended to give the appearance of being in general those of a building and loan association.

9. CRIMINAL LAW ⟹410—EVIDENCE—DECLARATION OF AGENTS—SCOPE OF BUSINESS.

As establishing fraudulent intent on prosecution of a company and its managers for use of the mails to defraud, statements of agents of the company to prospective purchasers of contracts are admissible; the evidence clearly indicating an established course of business, and that the agents were expected to follow up the misleading advertising and contract by suppression of facts and misrepresentations.

In Error to the District Court of the United States for the Northern District of Alabama; Wm. I. Grubb, Judge.

Lee A. Whitehead and others were convicted under Pen. Code, § 215, and bring error. Affirmed.

Walker Percy, Augustus Benners, and E. N. Hamill, all of Birmingham, Ala., and Wm. S. Forrest, of Chicago, Ill., for plaintiffs in error.

Oliver D. Street, of Guntersville, Ala., for the United States.

Before PARDEE, WALKER, and BATTS, Circuit Judges.

BATTS, Circuit Judge. Lee and F. A. Whitehead, L. F. Harris, and the Standard Home Company were indicted for fraudulent use of the mails. Each of the 42 counts of the indictment charged that the defendants devised a scheme involving "the sale of contracts"; the contracts having pertinent features as follows:

(1) The purchaser paid at the time of the application $6, and was thereafter to pay $6 per month for 80 months. The first $6 were retained by the agent, and the first, second, and third monthly installments by the company; $4.75 of each subsequent monthly installment became a part of what was called a "loan and reserve fund," from which loans and cash settlements were made and certificates paid.

(2) After the payment of 6 monthly installments the owner became "eligible" for a loan "in the order of his application"; but if a loan were made before 12 monthly installments had been paid in, the bor-

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rower would have to advance a sum to make the total equal to 12 installments.

(3) "When the owner is entitled to a loan or funds to purchase a home," he furnishes the abstract, executes a mortgage, and pays thereafter $7.50 per month and interest.

On the back of the formal contract were "Benefits, Provisions, and Requirements." Of these the following may be pertinent:

Section 6 gave the company 60 days to approve the property. Section 11 provided that "no officer or agent of the company, general, special, or state agent, has any authority to promise a loan." Sections 13, 14, and 15 provide, after 12 consecutive monthly payments had been made, the owner might secure certificate for the amount which he had paid into the loan and reserve fund, together with 3 per cent. interest for the average time of the payment, which certificate would mature after 80 months, and draw 5 per cent. interest. After 12 months the contract has a cash surrender value of 50 per cent. of the amount paid to the loan and reserve fund, together with 3 per cent. interest on the average time of payment. After 24 months the cash surrender value was 75 per cent. of the amount paid into the loan and reserve fund, together with 3 per cent. interest on the average time of payments. After 80 payments, the owner, "having refused the acceptance of a loan, or not having received a loan," was entitled to withdraw "the amount of his credit" from the amount paid to the loan and reserve fund, with "his pro rata earnings" therein, not to be less than $528, nor more than $720. Not wishing to accept this, he might wait until the amount to his credit reaches $720.

In 7 counts the indictment charged that the device described was for the purpose of defrauding persons unknown. Upon these counts the defendants were found not guilty and they will not again be referred to. In the others of the 42 counts it was charged that the design was against named individuals. With reference to them severally it was charged that the defendants would fraudulently, and with intent to induce the purchaser to buy said contracts and pay money therefor, conceal the fact that the loan was promised only in the order of its number and when a sufficient fund had accumulated, but would pretend to him and thereby fraudulently mislead and deceive him into the false and mistaken belief that if he would comply with the contract for 6 months (or some other period) he would become entitled to, and at his option would receive, the loan; when, as defendants knew, the loan fund would not be sufficient to provide for said loan at the expiration of the period, and that he could not and would not, at the expiration of the time, receive the loan, or (in another count) when it was altogether uncertain whether he would be able to obtain the loan. The use of the mails in carrying out the scheme was set forth.

The indictment covers 91 pages of the printed record. Notwithstanding the apparent completeness of the statement of the design and of the method by which it was to be carried out, the defendants each primarily filed 67 demurrers to each count. After judgment, by assignments of error, the attacks on the sufficiency of the indictment were increased to 85. It is not fair to assume from the number of the assignments that all of them are without merit, and each has been

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examined with the same care as if this evidence of lack of confidence did not exist. Each assignment has been carefully considered, and none has been found which would appear to warrant a reversal of the case.

Embellished with an erudition almost innocuous because almost obsolete, and expressed with a clarity characteristic of the dialectical tergiversations of the medieval theological controversialists, some of the objections to the indictment and the argument in their support, involve processes of mental ratiocination not easily within the capacity of persons accustomed to deal with the law in its practical phases only. The conclusion, therefore, that the assignments are without merit is reached with diffidence. It is not more practicable for the court in the opinion to discuss each assignment than it was for counsel in the brief, and controlling conclusions only will be stated.

[1] As to a large number of propositions, the authorities invoked are cases of embezzlement, swindling, obtaining money by false pretenses, and the like. The difference between these offenses and the crime denounced by section 215, P. C., is very substantial. A prime purpose of the latter is to prevent the prostitution of the mail service. The incidental protection of the public from frauds supplements a service usually performed by the state. The devising of a fraudulent design is not enough to constitute the offense. The formulation of such a design, the scheme involving the purpose to use the mails, is insufficient. The offense involves the use of the mails in the consummation of, or in the effort to carry out, the fraudulent design. The gist of the offense is the improper use of the mails. While the fraudulent design is essential, it is merely an element of the crime. As where an indictment charges burglary to commit theft, the theft is not described with the same particularity as if theft were the offense, so, in charging the use of the mails to defraud, the fraud need not be stated with the technical details required when swindling, or a like crime, is the subject of the indictment. The consummation of the crime is not dependent upon the success of the scheme. The crime is complete before the letter designed to mislead or otherwise used in carrying out the scheme, is received by the intended victim. The person addressed may have the shrewdness to detect the fraud; or, being misled, he may be in such financial condition as to be proof against fraud. Neither fact will affect the crime. Neither the mental nor financial condition of the person against whom the fraud is directed, nor any action on his part or failure to act, will increase or diminish a crime completed when, a scheme to defraud having been devised, the mails have been used in an effort to make it effective. A consideration of these principles will render unnecessary a discussion of most of the propositions urged by defendants.

[2] A reference to the fundamental character of the offense will also be a sufficient commentary on defendants' dissertation upon negations. The indictment charges that the scheme involved the misleading and deceiving of the person named in the count into the belief that he would, after a stated period, become entitled to and receive a loan "when in truth and in fact" (1) "the loan or reserve fund would not be sufficient to provide said loan for said contract holder in said

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series at the expiration of said period of ——— months"; (2) "and that he could not and would not, at the expiration of said time, receive said loan"; or (3) "it was altogether uncertain whether said contract holder would, at the expiration of said period of time, be able to obtain said loan upon offering said security."

The three quotations last made are called by counsel negations 1, 2, and 3. Of these it is said that they are "negations which are negatives pregnant," and therefore void; "conjunctive negations," and therefore void; and "literal negations," and therefore void. Whatever may be the technical learning with reference to the negations in indictments for obtaining money by false pretenses, perjury, and like offenses, there is no present occasion for its application. The language used is intended to and does indicate wherein and how the scheme devised was fraudulent. It satisfactorily supplied a necessary element in the description of the device.

[3] A contention to this effect seems to be made: The indictment alleging that the contract holder was fraudulently misled into the belief that the contract provided that he could secure a loan in six months, and negativing such an effect for the contract, did not allege that he could not get his loan in six months and one day; that the maxim de minimis would apply to one day; that one might do the things charged, and yet not be subject to the law. If this proposition were meritorious, it would not be possible to draw an indictment that would properly charge the offense here involved. Whatever period might be given to cover the additional time required to escape the rule de minimis would have another little period following it, which could just as well be the basis for an invocation of the rule.

[4] It is insisted that the indictment is insufficient because the scheme described is "not apparently adapted to the accomplishment of the crime intended to be committed." It could just as well be contended that, if it were apparent that the scheme was fraudulent, an indictment charging it would be void. It is scarcely practicable for a court, in determining a demurrer, to pass upon the feasibility of a scheme to defraud. Before hearing the evidence, the court would, perhaps, be warranted in acting upon the assumption that, if it had not been effective, no complaint would have been made.

It may also be well to concede to persons engaged in a line of business superior knowledge of its requirements for success. It is probable that no one who has not given the matter serious study for practical ends can fully realize the different degrees of ignorance and gullibility represented by the population of America. No scheme to defraud, however well conceived for evil results, would probably reach all of the people; and few schemes, however transparent, would fail to find some victims. Nor is the fact to be ignored that many persons, the subjects of suspicion, have, in the development of their enterprises, been themselves the victims of a dangerous combination of arithmetic and imagination. Without suggesting that it would be impossible for the scheme to defraud to be so entirely incapable of that end that a demurrer to an indictment describing it would have to be sustained, a

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consideration of the quality of the scheme would ordinarily be within the province of the jury.

But, if the abstract legal proposition made by defendants were unquestioned, the ruling in this case would not be disturbed. A careful study of the elements of the scheme would premise the success it attained. The scheme had the appearance of legality. It was embellished with all the legal phraseology and formality so efficacious in concealing consequences and creating confidence. The language used was excellently conceived to mean one thing and create the impression that it meant something else. The contract used the standard device of referring to the application and making it a part of the contract—a part not within the custody of the owner. Important provisions of the contract, expressed in obscure language, were inconspicuously printed in small pica on the back of the signed instrument. These are favorite devices for businesses whose prosperity depends upon overreaching, and are not less useful to those who pass the hazy border into criminal fraud. The scheme primarily devised, improved by the suggestions of experience, was apparently well adapted to effecting an exchange of valueless promises for money. The indictment is not subject to the objection that the scheme it describes is not apparently adapted to the accomplishment of the crime intended to be committed.

[5] The contract recites that the application is a part of the contract. The application is not set forth in the indictment, and this fact is the basis of several assignments. It was not necessary that the contract be set forth in full or stated as completely as it was. The application did not change the legal effect of the contract. Its omission did not affect the validity of the indictment, nor was it in any way disadvantageous to defendants. While trapping the applicant into signing something which could subsequently be used in an effort to confuse him was evidently a part of the general scheme to defraud, there is no rule requiring that the description of a fraudulent scheme should mention all the auxiliary devices.

[6] In setting forth in the indictment the contract, the pleader introduced it with: "A contract of tenor in substance as follows." Many assignments are predicated on this clause, and in their support are lengthy arguments. The propositions might be condensed into this syllogism:

(1) Contradictory statements in an indictment render the indictment void.

(2) The words "tenor" and "in substance" are contradictory.

(3) The words "tenor" and "in substance" are used together in the indictment.

(4) The indictment is void.

The logic is perfect. If the premises were not erroneous, the conclusion would be unassailable. Neither etymologically, philologically, nor legally is there any necessary conflict between the words; and, as used in the indictment, the words "in substance" modify "tenor," and indicate that the contract is substantially as set forth.

Most of the attacks upon the indictment are apparently predicated upon the postulate that an indictment requires a character of English

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composition entirely different from that used for any other purpose, and that, in a determination of its meaning, all the ordinary rules of interpretation are abrogated. With reference to every other instrument which comes before a court, an effort is made to ascertain the meaning intended by the writer. As to an indictment it is insisted that every possible effort should be made to divest it of meaning. A word too many avoids it; a word omitted is fatal. If a word or clause may be given a possible meaning antagonistic to another word or clause, that meaning must be given, rather than an obvious meaning which would be consistent.

Even when perversion of the language is not undertaken, perfection of expression is insisted upon. Many English words have more meanings than one, and a writer whose thoughts are entirely clear and logical must be content sometimes to have a question raised as to the meaning of the language in which he undertakes to give them expression. There is little in literature beyond the reach of the hypercritical. The Lord's Prayer and the Commandments have not escaped. One who can find 85 objections to the indictment in this case could probably suggest improvements in the Gettysburg speech. It is not quite reasonable to demand of prosecuting attorneys that they should show a talent for lucid and accurate expression, not expected of any other person. We shall decline to give aid in the maintenance of rules so manifestly in conflict with good sense, and so potently subversive of efficient administration of the law. The time of a court may be more profitably used than in the perpetuation of absurdities.

The objections which may properly be urged to the indictment are not such as may be charged to the representative of the government who drew the indictment. As heretofore stated, the indictment covers 91 printed pages. Every essential fact could probably have been stated in one-tenth of that space, except that it was conceived necessary to follow well-established forms and time-honored phraseology. It is to be regretted that prosecuting officers cannot feel safe in so drawing an indictment as to make it a simple and straightforward statement of the facts upon which the government depends for conviction. It is to be regretted, too, that the useless repetition in the counts cannot be obviated. Each of the 85 objections to the indictment is lacking in merit. But, if it had been suggested that the charges against defendants are obscured by excessive verbiage, the proposition would be considered with sympathy, because of inherent merit, and overruled with regret, because the forms used are sustained, perhaps required, by precedent.

But, if we have little sympathy with the effort to defeat the law by verbal gymnastics, there is every inclination to see that defendants are not deprived of any substantial right by any technical rule. On this account, we have examined all the assignments, notwithstanding some of the objections to the indictment were not properly raised in the trial court, and notwithstanding counsel for the government have made exceptions to the assignments and brief that may be meritorious.

[7] On the oral submission of the cause, counsel for defendants were called upon to point out wherein any harm or disadvantage or

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prejudice had resulted to defendants from the assumed defects in the indictment. Nothing more specific was indicated than that the defendants had been deprived of legal rights. If they were deprived of a legal right by any ruling, the case should be reversed. They are entitled to be tried in accordance with law. They are entitled, however, to no more than a trial by law as the law is. They cannot invoke the law as it might have been, if the tendency to permit absurd technicalities to defeat the purposes of the law had not been checked by persistent public protest and stopped by tardy, but wise, legislation. In some of the states it is still possible for an omitted letter or a misspelled word to cancel a judgment of conviction. But this court is given statutory authority to observe the dictates of common sense. Rev. St. § 1025 (Comp. St. 1916, § 1691).

Not infrequently unsound propositions have become so incorporated into the jurisprudence as developed by the courts that they have become rules of property rights. They become the basis of legal advice. The lawyer considers it safer to follow a poor opinion than a good reason. In such case, disregard of, or change in, the rules as applicable to past transactions, might bring about unjust and inexcusable results. But no one ought to be held to have a vested right in the veteran absurdities of criminal procedure; no one should be permitted to plead that he would not have violated the laws of his country, except for his confidence that foolish and illogical rulings would continue to be observed, whereby he would have acquired immunity. The trial judge properly disposed of all issues made with reference to the indictment.

[8] In 479 additional assignments of error, the rulings of the trial judge in the admission of testimony and upon other matters are assailed. The excellent briefs enable us quickly to ascertain the limited number of real questions involved. The most important issue is whether the evidence is sufficient to sustain the verdict of the jury. There is very little conflict in the testimony; and, after the somewhat prolonged delay incident to the reading of the 4,000 pages of the printed record, the issue may be passed upon without hesitation. The circumstances depended upon by the government to establish the fraudulent character of the transactions of the defendants are the terms of the contract, the character of the advertising, the conduct of agents of the company, and correspondence between the company and persons misled by the agents.

Counsel for defendants make the proposition that the scheme or device evidenced by the contract is not open to more criticism than some of the insurance contracts, and other financial transactions in which the mails are used, indulged in from day to day all over the country. This proposition could, perhaps, be acquiesced in without absolving defendants of guilt. The statement may be less an exoneration of defendants than an attack upon the officers charged with the enforcement of the law. Certainly, the contract of the Standard Home Company is not the only contract in use in which excessive and involved verbiage is used to conceal its character and to induce the careless or credulous to part with money upon the assumption that they are securing something which they do not get. It is even conceived possible that defend-

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ants believed that that which they were doing was not in violation of law. There is evidence to indicate that they had the law before them always, and it may be they did not realize that they had crossed the ill-defined boundary line that lies between nonpunishable overreaching and criminal fraud. Whoever approaches the line, approaches at his peril.

The contract covers 24 pages of the record. In the form in which it reached the purchaser, the body of the contract, surrounded by a colored margin and ornamented by a big red seal and the cut of a palatial home, was made up of provisions which cover 4 of the 24 pages. The balance of the contract, covering 20 pages, is printed under the title "Benefits, Provisions, and Requirements," in small type on less than three-fourths of the other side of the paper. The difficulty of reading, however, is not comparable to the difficulty of understanding. Practically every paragraph is obscure and involved. Cognate matters are considered in paragraphs remote from each other. When otherwise difficult to prevent, clearness is obviated by referring to sections "on the back hereof." Every paragraph, except one, in the main part of the contract, refers to the loan. This deals with the maturity of the contract holder's obligations. The first 7 sections of the "Benefits, Provisions, and Requirements" are with reference to the loan, as are section 17 (two paragraphs), section 18 (three paragraphs), sections 19, 20, 21, and 22. Sections 13, 14 and 15 deal with settlements which may be made "provided no loan has been made or home has been purchased." Only after reading the main contract and 18 sections of the "Benefits, Provisions, and Requirements" will the contract holder find the provisions by which it is apparently determined whether he shall have a loan. Sections 19 and 20 provide for classes, series, and issues of contracts, determined by a process within the control of the "company." When an applicant for a contract is accepted, a contract will be issued in a "series and issue" then open, and receive "the next number in the order to the contract last before issued." "It is expressly agreed that the numbers given at the home office to applications and contracts shall be held and taken to be the proper numbers of the same." The owner of the contract, "in the order of his application," "out of the funds of the particular series," is entitled to a loan "immediately upon the receipt of such funds available for his contract." The sections from which these provisions are taken are long and the language obscure.

Any person, including one accustomed to reading and considering legal instruments, would, from a reading of the contract, assume that the business of the company was loaning money, and that the purpose of the purchaser of the contract in acquiring the contract was obtaining a loan. All the provisions with reference to cash settlements and certificates of payment, upon any except a most careful reading, would appear to be effective only when the purchaser shall have exercised an option not to take the loan. Repeated and careful readings of the contract will leave in the mind of a capable lawyer doubts as to its meaning in a number of respects. The language of the contract is well adapted to mislead persons not accustomed to considering legal in-

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struments, and persons not familiar with business matters into assuming that they had, by purchase of the contract, acquired an opportunity of obtaining a home by paying monthly installments. Except for the misleading character of the contract, it would probably have been impossible for the company to have secured any degree of success. The business involves the idea of the contract holders' paying in money, a portion of which is to be put into the fund from which a small per cent. of them might borrow. The first payment of $6 is compensation to the agent for misleading them. The next three payments of $6 each were appropriated by the persons who devised and carried out the scheme. Out of each $6 thereafter paid, some of the persons who paid it in are permitted to borrow $4.75, under a scheme leaving it entirely within the control of the managers of the concern as to who the borrowers should be.

The experience of the company indicates that a large per cent. of purchasers, when they first see the contract, realize the improbability of securing a loan or getting any returns from their investment, and simply lose the first $6 paid in. Another large per cent. of the victims do not pay beyond the second or third installment, and do not reach the installment from which loans are made. Another considerable percentage of the contract buyers pay up to the time when they become "eligible" for a loan, when, realizing the difference between eligibility for a loan and securing the loan, they sacrifice all or a part of what they have paid. There is no probability that any person would have purchased the contract as an investment. The minimum maturity value was possible only by giving to some a part of that which others lost. The time of the payment was indefinite, the security was inadequate, and the amount payable contingent. If the contract holder considered the matter from the standpoint of securing a future cash settlement the best that he could hope for was to receive, after having made 12 payments, a little more than half of such part of the amount paid in by him as was permitted to reach the loan and reserve fund. Upon the payment of $78 by him, which would be the initial payment and 12 monthly installments, he would receive 50 per cent. of the 9 amounts, of $4.75 each, applied to the loan and reserve fund from the installments after the third, and he would be permitted to receive 3½ per cent. interest on the average time of the payments. His total return on an investment of $78 would be $27.70. If he were induced to keep his money in the enterprise for as much as two years, his losses would be only the initial payment, the first three installments, $1.25 out of each subsequent installment, 25 per cent. of what was left, and the difference between 3½ per cent. interest and the current rate.

In another connection some of the features of the contract suggesting fraud were mentioned. Other provisions, which could have been, and apparently were, improperly used, include one precluding inquiry as to whether a proper number had been given the contract; another, permitting temporary loans and other diversions from the funds pertaining to an issue; another, retaining control of transfers; another, giving the company control of the numbering of the contracts by authorizing it to determine the number to be placed in an issue,

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and when and how they are to be filled. Notwithstanding all the money is furnished by the contract holders, they are entirely without a voice in its administration; and notwithstanding 20 pages of provisions, not one furnishes them any degree of protection.

The advertising of the company was not less misleading than the contract. In few instances only are there affirmative misstatements. The mendacity involved was more efficacious and less dangerous. The part of it which went into the papers was substantially confined to an announcement that the company was lending money at 5 per cent. The statement was untrue; but, even if it had explained that payments were monthly, and that interest was calculated on yearly balances, the rate was sufficiently under the current rate in the section in which most of the business was conducted to attract attention and excite inquiry. Another part of the advertising which preceded the sale of the contract was an appeal to the homeless who desired homes. The appeal was peculiarly to those who could hope to own a little home only. The loan unit was $1,000. It is true there were a number of loans for larger sums. So far as the facts were developed, these larger borrowers were connected in some way with the company. But, without reference to who was to get the money, it was evidently expected that persons of small means should furnish it. This was, perhaps, not because of any peculiar partiality for the money of any particular class, but indicated an appreciation of the fact that the easiest approach was to those whose aspirations for homes exceeded their experience in business.

Some of these cases presented heart-breaking experiences. Even church organizations were made to suffer—churches of the poor where contributions meant, not alone devotion, but sacrifice. The case of Alice Holman was not typical, because the entire pound of flesh was not exacted. She paid in $144, and $100 was returned to her, an amount sufficient to cover, not only all that she had contributed to the loan and reserve fund which the company held in trust, but $14.50 of the $58.50 charged by the agent and the company for receiving the $144. She was evidently of that class of colored women, held all over the South in affectionate esteem, who, big of heart and strong of arm, knowing no lines of race and having no thought of self, love and serve children and the sick, the weak and all who suffer. "I generally take care of the sick," she said. "I keep the home for orphan children at Ensley." Once a kindly one in the company's office said to her: "Woman, I want to tell you this; don't you turn loose that $12; if you do, it will be the last you see of it." She paid the $12 every month until one of the little girls became ill. "After the little girl was taken down," she testified: "I had to stop work. I told him (the president) about the little girl being down, and I could not work, and of course he said he could not do me any good, and he said, 'You will have to pay in for 12 months.' * * * When the little girl kept getting worse, I kept pushing them for the money, and the day she was a corpse I wrote him a letter that morning. I went to see him afterwards. * * * I told him the little girl died, and I had to get two white men to stand for me to bury the girl. * * *"

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The following is a part of the advertising, directed evidently at persons whose income placed very humble homes only within their reach:

"You can lose $2,932.35. If you rent a $1,000 home for 10½ years and do not take advantage of the offer presented to you by the Standard Home Company, you certainly will not have the amount above mentioned. It does not seem possible that you would lose such large amounts just by renting a $1,000 home for 10½ years at $12.50 per month; however, we will show you the actual results in figures: Ten and one-half years' house rent at $12.50 per month is a loss of $1,575. You don't own the house, valued at $1,000. You have lost the difference between buying and renting, $357.35. Then you have certainly lost a total of $2,932.35."

Contemporaneously a bathetic appeal is made, which as ruthlessly attacks the English as the loss statement assaults the truth:

"The mother goes about her daily tasks with a song in her heart, serenely conscious that no grim stranger will throw the little ones and she out into a cold world, and that every loving touch she places upon things within its sacred walls is there to stay as long as she wills."

The advertising which followed purchase and disappointment will be referred to in another connection.

[9] The evidence principally depended upon by the government to establish a fraudulent intent were the statements made by the agents of the company to prospective purchasers of the contract. More than 100 witnesses were introduced, each of whom testified that the agent had, by statements, led him to believe that he would, at the end of six (or eight or some other number of) months, be able to secure a loan of $1,000 from the company at 5 per cent. interest. The introduction of this evidence was strenuously objected to by the defendants. The objection was upon the ground that the representations were not the representations of the defendants or the company. If there had been evidence of a single transaction only, or of isolated and occasional transactions, the contention might have appeared meritorious. But the accumulated evidence, aided as it was by evidence of the subsequent conduct of the company, and by the correspondence with which the misrepresentations were always followed up, clearly indicates an established course of business, an important feature of which was systematic misrepresentation by agents. It is apparent that the agents were expected to follow up the misleading advertising and misleading contract by suppression of the facts that should have been disclosed, and misrepresentations as to terms and effect of the contract. The agents realized, as the company realized, that the persons with whom they were dealing were not, in most instances, in a position to make investments, and that they were, in order to acquire homes, paying each month no inconsiderable part of their small incomes. They knew, and the managers of the company knew, that unless these persons were misled the contracts could not be sold.

A frequent course of events was that, after the agent, by his misrepresentation, had secured an application for a contract, and 6 months of installments had been paid, the contract purchaser would indicate to the company that he was ready for his loan. Thereupon the company would write him that it was true that he had now become "eligible" for a loan, but that he had not been reached in the order in which loans

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were made. The purchaser would then make a statement of what had been said to him by the agent. Thereupon the company would express surprise that he had been misled, and would call attention to the fact that he, the purchaser, had made an application in which he had stated that he had read the contract and understood its terms. A response from the victim is to the effect that it is impossible for him to continue the payment of the installments upon the uncertainty of securing a loan; whereupon the company begins to send literature entirely new to the contract buyer, supplemented by letters, in which the purchaser is urged to continue his payment. It is argued, and many figures are used to establish, that the person who receives his loan last is really the one who gets most benefit from the contract. If this fails as a soporific, and the contract buyer undertakes to secure a cash settlement, the company expresses regret (no doubt, with all sincerity) that the contract holder has determined to stop payment of installments, and tries to show him that, outside the loan feature, the investment is a good one.

It is at this point that the example in compound interest is usually introduced. Among "the profits of the company and investors" is (says the advertisement):

> "(2) Compounding or reloaning both principal and interest as paid monthly."
> "The compounding of the interest and principal is not paid by a borrower, for few men are good enough financiers to compound their money, nor is it paid by the investor. It is simply made by the good plan of the company, and its able financiering. The illustration below shows $1,000 compounded at 5 per cent. interest per month for every month in the year for one year, which will verify our statement."

A table follows which shows that the $1,000 at that modest rate, compounded monthly for one year, will amount to $1,795.8320158071-29150348625. The company frankly acknowledges that it "does not have the advantage of compounding the entire thousand dollar loan every month." It abstains from suggesting that it does not get 5 per cent. per month for any part of it. If, notwithstanding the impressive figures quoted, the contract owner insists upon a cash payment, the next interesting fact developed by the correspondence is that he is not to receive even 50 per cent. of what he has paid in, but 50 per cent. of what he has paid in that has been appropriated to the loan and reserve fund, and that he would not get back any part of the $6 primarily paid in, any of the first three payments, or any part of $1.25 out of each of the subsequent payments. At this point the victim ordinarily takes what he can get.

The initial correspondence in most cases calls attention of the purchaser to the fact that he has signed an application in which it is stated that he has read the contract and understands its terms. The evidence shows that the agents, in many cases, would state to the prospective buyer that he did not happen to have a copy of the contract with him; and, in most instances, the first time the contract buyer sees the contract is when, after having made his initial payment, the contract is sent to him by the company. The application is signed by the purchaser, as applications ordinarily are, after having been prepared by the

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agent, and after its terms have been explained to him by the agent. In very few cases was it the fact that the purchaser either saw the contract or had any knowledge of the provision in the application that stated that he had read and understood it.

The purchaser had a right to depend upon the statements of the agent, and a right to assume that the application and the contract were as represented by the agent. This right was not destroyed by the circumstance that the company undertook to relieve itself of responsibility for the acts of its "agents, general, special, and local." The course of business and uniform correspondence indicates that the provision referred to in the application, to the effect that the purchaser had read the contract and understood it, was put there as part of the scheme to defraud and as tangible defensive matter when correspondence became necessary, rather than for the purpose of having the purchaser know the character of the obligations he was assuming, and of the rights which he was acquiring.

Notwithstanding the large number of instances called to the attention of the company of misleading statements by agents, the record does not show a case in which such agent was discharged or reprimanded by the company for his misconduct, or compelled by the company to make restitution to the defrauded person. Nor is there a single case in which, after ascertaining that the purchaser had been defrauded, the company undertook to make him whole. The defendants who have been convicted were in active control of the affairs of the company. The representations made by the agents came to their attention. They permitted money to be taken by their agents with knowledge of the fact that the purchasers would not have parted with the money if they had not been deceived. In many cases they got the benefit of the first three payments with the knowledge that misrepresentations had been made; or, having gotten the benefit of these payments, and having the fact of misrepresentation brought to their attention, made no effort of any kind to restore the purchaser to his original condition. The correspondence brought to their attention in a very large number of cases the fact that application had been made by persons who had not read the contract, and, further, that in many cases where purchasers had read the contract they had misunderstood its terms and effect. The contract, as heretofore suggested, is calculated to mislead, and defendants knew that fact, because they knew that in a very great number of instances it had had that effect. It is apparent, not only that defendants knew that large numbers of persons were being misled by the agents, by the advertising and by the contract; but it is also apparent that they knew, and relied upon the fact, that many of the purchasers would soon realize that they had been defrauded, and would forfeit what they had paid in, or accept whatever they could get and surrender the contract. They knew, also, that many of the purchasers who might never realize that they had been defrauded would stop payment when they ascertained that being "eligible" for a loan had the same relation to securing a loan as being eligible to the presidency had to holding that high office. They knew, too, that the incomes of many of the

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purchasers were not equal to paying rent and to paying installments while waiting for a loan.

Even if there were absence of evidence of specific cases of misrepresentation brought to the attention of defendants, familiarity with the general course of business would negative a claim of innocence. The contracts issued covered classes "A" and "B." In class "A" 11,804 contracts were written, covering business for five years, ending June 29, 1912. In this class 543 loans were made. One out of every twenty-one purchasers received a loan. Eighty-nine contracts were carried to maturity. Assuming a separate purchaser for each contract, 632 purchasers were permitted to get what all expected. Each of the other 11,172 purchasers lost all or a part of what he paid in.

Up to June 29, 1912, the company had sold 34,607 class "B" contracts. On 13,430 of these no payment was made except the first. These payments were made before the delivery of the contract. These persons, having paid $80,580, lost this amount and quit. No part of this went to the loan or reserve fund. At the time of the examination 8,643 of the 34,607, or just one-fourth, had forfeited their contracts after paying one or more installments, in addition to the first $6. Assuming only one installment by each of them, these persons paid in $103,816, receiving therefor no benefit of any kind, and no part of the money going to the loan or reserve fund. Nearly 64 per cent. of the purchasers having suffered a total loss of what they had paid in, another 5 per cent. took the partial loss of cash settlement. A fortunate 2.55 per cent. received loans; 2.16 per cent. obtained paid-up certificates, and the remaining one-fourth continued to hope and pay. Those who received loans waited an average of 25.16 months.

These facts of the business render unnecessary any further comment in support of the verdict of the jury. No error that would justify a reversal has been found in any ruling of the court.

The judgment is affirmed.

(245 Fed. 399)

CLALLAM LUMBER CO. v. CLALLAM COUNTY et al.

(Circuit Court of Appeals, Ninth Circuit. August 6, 1917.)

Nos. 2905–2908.

1. TAXATION ⚷338—ASSESSMENT—MODE OF ASSESSMENT—TIMBER LANDS.

The action of the assessor of a county containing large tracts of timber lands in dividing such lands into zones for the purposes of assessment *held* not illegal, under the laws of the state requiring equality in the assessment of all property, where the zones were determined by the character and value of the timber in each, and its location with reference to the cost of marketing.

2. TAXATION ⚷494(3)—LEGALITY OF ASSESSMENT—REVIEW BY COURTS.

Owners of timber lands *held* not entitled to relief in equity against the assessment of their lands, affirmed by the board of equalization after hearings, in the absence of proof establishing fraud, or discrimination against any class or owner, or showing the violation of any fundamental principle of uniformity, and where the testimony as to value, while conflicting, fairly sustained the assessment made.

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3. TAXATION ⟹494(3)—ASSESSMENT—EFFECT OF ERROR IN ASSESSMENT OF OTHER PROPERTY.

Error in the assessment of a certain class of property through a misapprehension of the law will not invalidate the assessment of other property.

Appeal from the District Court of the United States for the Northern Division of the Western District of Washington; Edward E. Cushman, Judge.

Suit in equity by the Clallam Lumber Company against Clallam County and Clifford L. Babcock, Treasurer, heard with suits by the Clallam Lumber Company against Clallam County and Herbert H. Wood, Treasurer, and by Charles H. Ruddock and Timothy H. McCarthy against Clallam County and Clifford L. Babcock, Treasurer, and against Clallam County and Herbert H. Wood, Treasurer. Decrees for defendants, and complainants appeal. Affirmed.

The above-entitled four cases were consolidated for trial in the District Court, and as they are controlled by substantially the same evidence and by the same principles of law they may be considered in one opinion. They are suits in equity against Clallam county, Wash., and the treasurer of the county, to vacate and set aside the taxes levied upon certain lands by the county, or such amount of taxes as may be found to have been unjustly levied, and to enjoin the issue of delinquency certificates against lands levied upon, and sale by the county treasurer based upon alleged fraudulent and unlawful assessment and equalization of taxes.

Case No. 2905: The Clallam Lumber Company, appellant, to be called plaintiff, is a Michigan corporation owning 41,000 acres of timber lands in Clallam county. The complaint is elaborate, but in substance charges that in 1913 the assessor of the county and the board of equalization, in equalizing, arbitrarily and unlawfully overvalued the lands in pursuit of a policy begun and followed by the tax officials for years prior to 1913, whereby timber lands belonging to nonresidents and situate principally in the western portion of Clallam county were assessed at grossly higher values in proportion to their true value in money than all other classes of property in the county, particularly agricultural and town lots in Port Angeles, the county seat; that in the eastern district are well-settled farming communities, the voting power of the county being in the east and the middle districts; that in 1912 and 1913 the board of equalization was composed of five members, three residing in Port Angeles, one in the eastern and one in the western district; that the members of the board of equalization who resided at Port Angeles owned property at Port Angeles, and that to favor Port Angeles and themselves, and to put the burden of taxation upon timber lands owned principally by nonresidents, the assessor and the members of the board of equalization residing at Port Angeles conspired with the east end commissioner to value property in and about Port Angeles at a low sum, but to value timber lands in the west end, and particularly the timber lands of plaintiff, at high figures; that the citizens of Port Angeles desired timber owners to build railroads into the interior and to bring their logs from the interior to Port Angeles to develop that city; that the assessing officers of the county meant to assess timber lands in the west end of the county at exorbitant sums to compel the owners to cut timber and build railroads and mills and aid the development of the county; that the lands of plaintiff are without facilities for transportation, most of them being cut off from the Straits by mountains, and that it is beyond the means of plaintiff to build railroads to transport the logs; that on the Straits of Fuca there lie fine bodies of timber which can be and are logged to the Straits; that in assessing the timber lands the officers divided the lands into zones, assessing all timber lands in one district at the same valuation per thousand feet; that the zones were laid off

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without reference to the real value of the timber lands within them, or to the elements which would go to make up uniformity of value, and without regard to the system of cruises adopted by the county on its timber lands, with the result that plaintiff's and other interior timber lands were valued higher in proportion to their real value than the timber lands lying along the Straits tributary to tidewater and operating railroads and presently marketable, the object being to compel plaintiffs and other owners of idle timber lands to cut and operate; that the custom in the state of Washington was to assess property at from 35 to 50 per cent. less than its actual value, and that while the assessing officers of Clallam county claimed for 1913 that they assessed and equalized on a basis of 53 per cent. of its true value, in fact, property at Port Angeles was assessed and equalized at not to exceed 10 to 20 per cent., that farming lands in the eastern end of the county were assessed at not to exceed 25 to 30 per cent., while timber lands in the interior were put at sums greatly in excess of 53 per cent., and plaintiff's lands, being in the interior, at nearly 83 per cent., of their fair value. Plaintiff further alleges that it appeared before the county board of equalization in 1912 and 1913, and protested, but without avail, and that the protests of plaintiff were arbitrarily overruled; that at the time of the assessment the fair value of the plaintiff's lands did not exceed $2,050,000, and that under the custom prevalent should not have been valued at more than $1,025,000, but that the lands were wrongfully assessed at a sum exceeding 50 per cent. of their true value; that the levy for 1913 aggregated $50,049.59, whereas a fair levy would not have exceeded $30,000; and that by the fraudulent practices followed there were unlawfully imposed upon the lands described in a schedule, which is attached to plaintiff's bill, taxes for 1913 to the amount of at least $20,049.59 in excess of taxes which might be lawfully imposed. Plaintiff avers that in 1914 it tendered and paid into court $30,000. The defendants answered, denying all charges of conspiring, discrimination, partiality, injustice, and fraud, denying that it was the custom of assessing and taxing boards to assess property at from 35 to 50 per cent. of its true value, or that any different basis than the true value of plaintiff's property was employed, and set up that the lands of plaintiffs bear timber of exceptionally high grade and are proportionally more valuable than smaller or isolated tracts in the same localities; that in 1908 the county employed proper timber cruisers, who made detailed estimates of character and quality of timber standing upon the various legal subdivisions of land in the county, and that all lands in private ownership were cruised and platted into tracts and zones, with plats and detailed reports concerning physical characteristics, agricultural possibilities of lands, and other matters, which were filed, by which the assessing officers could determine the value for assessment and taxation; that the assessments made were the result of honest and deliberate judgment, after careful investigation and fair hearing, as required by the laws of the state of Washington in force in 1912 and 1913 (Laws of 1897, chapter 71). After trial the District Court held that plaintiffs had failed to make a case entitling them to relief, and the complaints were ordered dismissed. The decree provided for a credit by the county upon the taxes levied upon the plaintiff's land in the sum of $29,400, to be apportioned among the lands in the specific manner set forth in the decree. The credit matter presented itself in this way: The plaintiff had paid into court $30,000 on November 7, 1914, as a tender. This sum, less $600 clerk's commission was by stipulation of the parties paid into the county of Clallam and receipted for as a payment into the county of Clallam, and receipted for as a payment pro tanto without prejudice to the contention of either party.

Case No. 2907, Clallam Lumber Company v. Clallam County and Wood: Relates to the same lands as in No. 2905, but the taxes involved are 1914. It is claimed that, if properly assessed at a value of not more than 50 per cent., the tax would not have exceeded $25,466, but that they were taxed $42,960, or an unlawful excess of $17,494.78. Tender of $25,466 was made, and the decree ordered the suit dismissed, without credit for any payment.

Case No. 2906, Ruddock and McCarthy v. Clallam county and others: In this action the assessment of lands for the taxes of 1913 is involved. The plaintiff's lands, consisting of 7,941.06 acres, were situated in zone No. 2.

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The aggregate assessment for 1913 was $479,990, and it is claimed that the total assessable value of the lands on March 1, 1912, did not exceed $550,000, and that under the law and practice the assessment should not have been more than $275,000. The tax amounted to $15,809, as against $9,250, which plaintiffs say should have been the maximum assessed. The tender in this case was $9,250, and the decree ordered the county to credit this sum, less clerk's commission, toward the taxes on plaintiff's land for 1913 pro tanto.

Case No. 2908, Ruddock and McCarthy v. Clallam County and Wood: The taxes involved in this suit were upon the same lands as in case No. 2906, but were those assessed for 1914. The contention here is that, while the aggregate value of plaintiff's land did not exceed $550,000 on March 1, 1914, and should not have been assessed at more than 50 per cent. of this value, they were in fact assessed at $561,395, or 102 per cent. of their actual value; that the taxes ought not to have exceeded $6,905, but they amounted to $14,095. Tender of $6,905 was made, and the decree ordered the suit dismissed, without credit for any payment.

Earle & Steinert and Peters & Powell, all of Seattle, Wash. (Butterfield & Keeney, of Grand Rapids, Mich., of counsel), for appellants.

Frank L. Plummer, of Port Angeles, Wash., and John E. Frost. Edwin C. Ewing, Richard Saxe Jones, and C. F. Riddell, all of Seattle, Wash., for appellees.

Before GILBERT and HUNT, Circuit Judges, and WOLVERTON, District Judge.

HUNT, Circuit Judge (after stating the facts as above). The briefs and arguments of appellants are addressed principally to these points: (1) The practice of the assessor in dividing the timber lands into zones and the classification by zone system for the purpose of assessment and valuation; (2) the measure of value adopted by the defendants for assessment and for taxation; (3) the question of the existence of a conspiracy and fraudulent combination of tax officials to discriminate unjustly against plaintiff's lands and in favor of other property.

The Constitution of Washington provides that all property not exempt shall be taxed in proportion to its value, to be ascertained as provided by law, and that uniform and equal rate of assessment and taxation on all property according to its value in money shall be provided, and that the law shall secure a just valuation for taxation of all property, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property. Article 7, §§ 1 and 2, Constitution of Washington.

In 1912 the laws of Washington provided that real property subject to taxation should be listed and assessed biennially on every even-numbered year with reference to its value on the 1st day of March preceding the assessment, that real property should be listed according to the largest legal subdivision as near as practicable, and that all property should be assessed "at its true and fair value in money"; the true cash value being that at which the property would be taken in the payment of a just debt from a solvent debtor. It was further provided that, in assessing any tract of real property, the value of the land exclusive of improvements should be determined, and the value of all improvements and structures thereon. 2 Remington & Ballinger's Code, §§ 9101, 9112, 9113.

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In 1913, section 9112 was amended by provision that all property should be assessed at not to exceed 50 per cent. of its true and fair value in money. Laws of Washington 1913, p. 438, § 1. It is provided that, when the assessor shall begin his work, that official is required to determine as near as practicable the true or fair value of each tract of real property listed for taxation and shall enter the value thereof in proper books. Section 9102. Section 9200 makes the county commissioners, the county assessor, and the county treasurer, or a majority of them, a board of equalization of the assessment of the property of the county. The board is required to examine and compare the returns of the assessment of the property of the county and proceed to equalize the same so that each tract or lot of real property and each article or class of personal property shall be entered upon the assessment list at its true and fair value according to the measure of value used by the county assessor in such assessment year and subject to certain rules. The rules authorized the raising of value of real property, which in their opinion is returned below its true and fair value, to a sum believed to be the true and fair value, after notice to the owner or agent, or they may lower values to what is fair, and they may raise the value of each class of personal property after notice, and they may reduce the valuation of personal property which in their opinion is rated above its true and fair value. By section 9212 county taxes are levied in specific amounts, and rates per centum determined from the amount of property as equalized by the board of equalization each year, except such general taxes as may be definitely fixed by law. All taxes are payable on or before the 31st of May in each year; but one assessment may be paid before that date, and time for the payment of the balance extended to the 30th of November following.

It can be said generally that, under the system prevailing in the state, taxes are assessed on property as of the value of March 1st, equalization by the board of equalization is had in October, and taxes upon real property are payable on May 31st. Inasmuch as assessment on real property was made biennially in the even-numbered years, taxes upon real property for 1913 were payable in May, 1913, based upon the assessments of 1912, equalized in October, 1912, while taxes for 1914 were based upon an assessment value as of March 1, 1914, equalized in October, 1914, and became payable in May, 1915. The evidence is that in 1908, under authority of the county officials, a cruise of the timber lands and a survey of other lands in the county was begun. The cruise was not finished until 1914, but the data obtained were full, and made part of the public records of the county, and were used by the assessor when he made assessments of timber lands for 1913 and 1914.

The maps accompanying the record show that Clallam county is long and narrow, bordered on the east and south by Jefferson county, on the west by the ocean, and on the north by the Straits of Juan de Fuca. In the eastern end of the county is the small town, Sequim. Port Angeles, a city of more than 4000 inhabitants, lies on the Straits, approximately one-third of the distance from the easterly line of the county. A large part of the county is included in a forest reserve,

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but in round numbers there are 529,920.06 acres of taxable land, of which over 356,000 acres are timber lands. In 1914 the total assessed valuation of the county was $14,576,197, of which more than $10,000,000 was the assessment on timber lands. Real estate in cities was assessed in 1914 at $2,114,957, and unimproved land, excepting timber lands, at $901,475, and improved land, with improvements, at $746,305.

The zones as created by the assessor for assessment purposes may be briefly described as follows: Zone No. 1 abuts upon the Straits, and extends east and west along the Straits for approximately 65 miles, and back from the Straits into the interior at distances from 1 to 8 miles. Zone No. 2, situate in the interior, is generally south of and adjoining zone No. 1 in part, and runs toward the westerly part of the county, extending southerly to the line of Jefferson county. The most southerly point in zone 2 would be about 30 miles from the Straits, and the most northerly point approximately 5 miles. Appellant Lumber Company owns 18,707 acres in zone 2. Zone No. 3, of much smaller area than zone 2, lies west of Lake Crescent, and is also in the interior and south of the easterly part of zone 1. In this zone appellant Lumber Company owns approximately 3,207 acres. Zone No. 4 lies south of zone 5, and is in the south central part of the county with a northerly line about 8 miles from the Straits. In this zone appellant Lumber Company owns 18,588 acres. Zone No. 5, also in the interior, is situated north of the Soleduck valley and on the westerly slope of a range of mountains, which separates the valley and the lands of plaintiffs from the Straits. Plaintiffs own about 798 acres in this zone. Zone No. 6 adjoins Jefferson county, and is situate south of zone 3, and about midway between the east and west ends of Clallam county. Plaintiffs own 80 acres in this zone.

It is conceded that upon the Straits and immediately adjoining the tidewater (zone1) there are large bodies of fir, cedar, spruce, and hemlock, and it is beyond dispute that in this zone the lands were properly assessed. It would extend this opinion too far to give the testimony about the topography of the several zones. We gather that, from the east end of the county back to Twin Rivers, which flow to the straits, there was a sloping bench for some 3 miles; the bench being elevated about 100 feet on the shore line and as much as 500 feet 6 miles back. The country from Twin Rivers is broken, some of it being at an elevation of 2,000 feet. The country included in the several zones is in part broken by mountain ranges. The Hoko river flows northerly into the Straits through the western portions of zones 2 and 1. South of the broken elevated portion along the Soleduck river, which flows westerly from Lake Crescent through much of the timber lands of plaintiffs, in zones 3 and 4, 6 and 2, is a valley for some 20 miles. Still further south of the Soleduck river is the Calawa river and valley, which is separated from the Soleduck by mountainous ridges. The elevations of the ridges vary from 2,500 to 6,000 feet. In zone 4 there are some level benches and rolling country, with higher lands in the northwestern part and mountains toward the Hoko river. There is evidence of feasible railroad routes from the several sections to deep water.

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The plaintiff introduced testimony of men of experience in buying and selling timber and conducting logging operations in Washington and other sections. A number of them testified to the effect that land with timber upon it had depreciated since about 1910, and that in 1913 and 1914, upon the interior lands involved herein, $1 per thousand for the fir, spruce, and cedar would be high value, but that such timber upon the Straits might be worth $2 per thousand and hemlock 75 cents, because of its being close to the water. Some of these gentlemen put the value of hemlock in the interior sections at 50 cents per thousand in 1912 and at lower valuations in 1913 and 1914. The higher value which the witnesses put upon the Straits timber was, as indicated, because of superior logging conditions. E. C. Duvall, an expert timber cruiser of long experience, and who knew the country, put the value of fir, spruce, and cedar on plaintiff's lands at $1 per thousand in 1913 and 1914, and of hemlock at 50 cents per thousand, except along the Pysht and Hoko rivers (Straits timber), where fir, spruce, and cedar was worth $2 per thousand and hemlock 75 cents.

On the other hand, the defendants offered evidence from men well qualified to testify concerning the value of timber, and who were in some instances specially familiar with the timber lands of the appellants, as well as with those in the Straits timber zone. Some of these witnesses said that they considered the fir, spruce, and cedar on the appellant's land in the interior as worth $2 per thousand feet in March, 1912 and 1914, and that the price of hemlock varied from $6 to $11 per thousand, and that the timber in the interior zones was worth as much as in the Straits zone. One of the witnesses said that, owing to the character of the land, it would be no more expensive to log into the waters of the Straits from zone No. 1 than from the other zones, and for 1912 and 1914 he put a value upon fir timber in the zone at $1.50 per thousand but that spruce and cedar ought to be worth $2 to $2.50 per thousand. A witness (Newbury), who had been 25 or 30 years in the logging and timber business, said he had been across a portion of the lands of the plaintiffs in Clallam county, and made investigation concerning the value of timber and the conduct of logging operations therein; that he knew the lands along the Straits, and had examined the county cruises in Clallam county; that in examining the timber of the plaintiff he had used an aneroid barometer, and had carefully studied the physical characteristics of the country in the respective zones; that in some instances he had taken up an acre, and counted and measured it, and that as a result his opinion was that on March 1, 1912, 1913, and 1914, the value of the plaintiff's timber was from $1.75 to $2 per thousand, and that the value of the Straits timber was about the same, but he thought hemlock was of no value whatsoever, except for use in logging operations; that he believed that the interior timber could be logged for less than in front—that is, fir, cedar, and spruce. Another qualified witness, Merrill, an owner of timber in Clallam county said he was familiar with timber in the Straits zone and with the timber land owned by the appellants. He considered quality of timber, cost of logging and operating, soil, etc., and thought the timber

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in the interior was worth fully as much, if not more, than the timber upon the Straits, and that in 1912, 1913, and 1914 the timber in the interior could have been operated at a profit at $1 per thousand, stumpage, basing that at $2 per thousand. During that time his own business had been operated at a profit at Gray's Harbor and Everett, and his own operations had been profitable more than 25 miles away from market or salt water. There was other evidence, but it is unnecessary to refer to it.

We concede that the witnesses for the appellants had sufficient familiarity with the country and the timber upon the lands of the appellants and the general conditions to entitle their judgments upon values to very high respect, and yet witnesses for the appellees equally well qualified in knowledge and experience have expressed opinions sustaining the values made by the officials.

Turning to the specific figures, we find this: In 1912 the fir, spruce, and cedar timber of the appellants was assessed at 70 cents per thousand feet in one zone, and at 60 cents in another zone. Now, taking the evidence as sustaining a conclusion that the market value of fir, spruce, and cedar at that time was $2 per thousand, we have the assessment made at approximately 35 per cent. of the value. The assessor himself has testified that in putting value upon timber he believed that the sums adopted were about 50 per cent. of the true value of the lands involved; that in 1914 he raised the assessment on fir, spruce, and cedar 10 cents a thousand, from 70 to 80 cents and 60 to 70 cents in certain zones, because he believed that previous assessments had been too low; that he had made an error in the assessments of 1912 because at that time he had had very little information. We then have the result that, with an established value of $2 per thousand feet, the assessment made was 40 per cent. of the market value for 1914. It is also proven that, when the assessed value was raised, it affected all timber lands in Clallam county.

Appellants argue that the evidence shows that their lands are without conveniences for transportation and access to markets, and it would cost a great deal to construct and operate a railroad to transport the timber from the interior lands of the appellants to tidewater. But there was much evidence introduced by the defendants to show that it would cost but little more to construct a railroad in the interior and to log the interior timber than to move and log the Straits timber. The evidence of freight tariffs on logs to be transported by transcontinental railroads does not furnish great aid in estimating the fair cash market value of the timber lands. It is the value of the land with the timber on it in the timber land market that primarily must govern, and the value from that standpoint is not to be controlled by the value of manufactured sawlogs made from the timber after it is felled. There is evidence, however, to the effect that timber, when it reaches Clallam Bay and certain other water points, has a value of $6, $8, and $11 per thousand feet as against the value of $2 per thousand in the tree growing on the lands in the interior zones. The evidence of the assessor was in substance that for 1914 he had used and considered the timber cruises which divided the timber lands into 10-acre tracts and gave the number of trees on each 10 acres,

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the average number of thousands of feet, amount of fir, spruce, cedar, and hemlock on each 10 acres, the character of ground, dead timber, burned lands, and also showed character of logging conditions on each 40-acre tract. In 1912 he says that he used the information then at hand, as to kind of timber, surface, and everything of a physical character, and in fixing zones he used his best judgment as to estimated values for timber assessment purposes. The members of the board of equalization were rigidly examined and also testified that in 1912 and 1914 they approved of the assessment rolls prepared by the assessor; that in 1914 they had the cruise books before them; that they weighed the timber estimates and always exercised their best judgment. Appellants have vigorously attacked these statements of the assessor and members of the board of equalization, but we think they have overlooked the whole of the testimony of the officials. We do not controvert the argument that, if there were nothing of substance except mere statements by the officials that they used their best judgment, such statements ought not to count for much against evidence of circumstances and facts which would show that there was no fair ground upon which they could have formed the judgments they did. But, as pointed out, such is not the case here.

[1] We fail to see that in the adoption of the zone system as a basis for assessment and taxation there was inherent error. Of course, an assessor must always be guided by the purpose that the tax levied upon each tract shall be relatively according to its real value. But if he proceeds in good faith on this principle and after examination of the physical location of the lands with reference to the advantages or disadvantages of situation of each tract, contour of the land, the quality and quantity of timber standing thereon and facility for logging, there can be no well founded objection to a classification by convenient area of growth, whether called zones, districts, or tracts. It is easy to understand how differences in value in several areas will arise and must be recognized as of practical importance. We all know, too, that an assessor is oftentimes confronted by a very difficult task in making distinctions in values of unoccupied lands; however, he must make the assessments as the law requires and must do the best he can, and although he has the rules of law to guide him, to a great extent he must use hard-headed judgment, which presumably he will be able and ready to apply to his task. In Doty Lumber & Shingle Co. v. Lewis County, 60 Wash. 428, 111 Pac. 562, Ann. Cas. 1912B, 870, the Supreme Court of the state considered an attack upon an assessment of lumber lands, where, before formal equalization was proceeded with, tentative bases of value had been put upon timber with relation to distances from a commercial railroad. The board of equalization, after hearing, raised the assessments of the lands, not adhering strictly to the tentative bases but considering distance of the property from a logging stream or commercial railroad and the contour of the land as affecting the expense of getting the lumber to market. The court held that establishing the limits in miles as bases of value was not action upon a fundamentally wrong principle, and distinguished the case of Hersey v. Board of Supervisors (decid-

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ed in 1873) 37 Wis. 75, cited to us by appellant, by carefully pointing out that in the Wisconsin case a fixed value was placed on standing timber within limits fixed by the authorities, without reference to statutory requirements in Wisconsin concerning logging conditions, quality of timber, or character of soil.

[2] As peculiarly appropriate to the case before us, we quote what the Supreme Court said:

"There is a marked divergence in the opinions of the respective witnesses as to the value of the timber land, but the law put the burden upon the appellants, and the trial court who saw and heard the witnesses concluded that they failed to meet the burden, and we are inclined to take the same view."

And in Louisville & Nashville R. R. Co. v. Greene et al. (decided since the present case was submitted) 244 U. S. 522, 37 Sup. Ct. 683, 61 L. Ed. 1291, we have the last expression of the Supreme Court of the United States, where it was said:

"The findings of an official body, such as the board of valuation and assessment, made—as was the case here—after a hearing and upon notice to the taxpayer, are quasi judicial in their character, and are not to be set aside or disregarded by the courts, unless it is made to appear that the body proceeded upon an erroneous principle or adopted an improper mode of estimating the value of the franchise or unless fraud appears. Pittsburgh, etc., Railway Co. v. Backus, 154 U. S. 421, 435, 436 [14 Sup. Ct. 1114, 38 L. Ed. 1031]; Chicago, B. & Q. R. Co. v. Babcock, 204 U. S. 585, 596 [27 Sup. Ct. 326, 51 L. Ed. 636]."

Our conclusion is that the evidence of the appellee meets any fair criticism of the zone method and that there is no reason for disturbing it. The assessments in the several zones are as follows:

Zone No. 1—1912–1913, fir, spruce, and cedar, 80 cents; hemlock, 40 cents. 1914, fir, spruce, and cedar, 90 cents; hemlock, 40 cents.

Zone No. 2—1913, fir, spruce, and cedar, 70 cents; hemlock, 35 cents. 1914, fir, spruce, and cedar, 80 cents; hemlock, 40 cents.

Zone No. 3—1913, fir, spruce, and cedar, 70 cents; hemlock, 35 cents. 1914, fir, spruce, and cedar, 80 cents; hemlock, 30 cents.

Zone No. 4—1913, fir, spruce, and cedar, 60 cents; hemlock, 30 cents. 1914, fir, spruce, and cedar, 70 cents; hemlock, 30 cents.

Zone No. 5—1913, fir, spruce, and cedar, 40 cents; hemlock, 20 cents. 1914, fir, spruce, and cedar, 50 cents; hemlock, 25 cents.

Zone No. 6—1913, fir, spruce, and cedar, 40 cents; hemlock, 20 cents. 1914, fir, spruce, and cedar, —— cents; hemlock, —— cents.

The Ruddock and McCarthy lands, which were in zone 2, in 1913, were assessed at 70 cents for fir, spruce, and cedar, and hemlock, 35 cents; in 1914, fir, spruce and cedar, 80 cents, and hemlock, 40 cents. Appellants have made a much stronger showing of possible overvaluation of hemlock than of fir, spruce, and cedar. There is much evidence tending to show that valuations of hemlock timber were high, but there is no substantial evidence that any discrimination against the lands of the appellants was had, and there is evidence to sustain the assessment of the hemlock as made by the assessor and sustained by the board of equalization. We are thoroughly satisfied that, if there was any overvaluation, it was due to honest mistake of opinion, and not to fraud. As was said in Olympia Waterworks v. Gelbach, 16 Wash. 482, 48 Pac. 251:

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"It is a well-known fact that there is often a wide difference of opinion as to the values of property among persons acting honestly and endeavoring to get at the true value, and, as this question must be settled somewhere, the law has reposed it in the board of equalization, and made their action final."

We understand, of course, that the court, in using this language, did not intend to commit itself to the doctrine that, where the action on the part of the officials was fraudulent, the courts would not interfere. It appears that the value of the hemlock in Clallam county was the same as the value put upon hemlock in other portions of the hemlock belt, or what is spoken of as the "Olympia peninsula timber." Again, appellant's assessment for 1914 was upon a valuation of $1,667,000, which included a value put upon hemlock of $223,426, which is less than 13.5 per cent. of the value of the total valuation put upon the property of the appellants.

Appellants offered much evidence, principally opinions from men versed in realty values, in support of their contention that a fraudulent combination of tax officials existed with the purpose of discriminating against the lands of these several appellants and in favor of other classes of property in Clallam county and in favor of timber lands which were being operated. To meet this, appellees also produced much evidence, but relied largely on the showing of just what prices were paid where actual sales had been had. With respect to real estate in Sequim, comparisons between prices at which a number of lots sold in 1913 and 1914 and the assessed values imposed in 1914 showed that the assessment was 48 per cent. Much other property in the town in 1914 was assessed at 58 per cent. of sale contract prices. There was sharp conflict as to some of the values; but, in the light of the evidence of the actual sales had, it is not for us to substitute our judgment for that of the lower court and the county officials. And like position must also hold in relation to the evidence concerning assessment of farm lands.

It is said that the assessment of Port Angeles real estate was dishonestly made and that values grossly below true values were imposed. The town, so the evidence discloses, had more or less of a boom in 1912, when prices rapidly increased, and considerable property was transferred. But witnesses tell that a change came soon after 1912 when prices fell. Opinions of witnesses as to values in 1914 are radically divergent and wholly satisfactory judgments are not easily arrived at. But the tabulated statements of assessed valuations for 1914, when compared with the valuations placed by several witnesses upon the town property, show that an average assessment of about 50 per cent. was had.

Complaint is made against the assessment of certain personal property—shingle mills, bank stock, and property of power companies. The assessor testified in detail about the condition of the several mills, their machinery, sizes, capacities, age, and locations, and said that he tried to make his assessments on the basis of 50 per cent. of actual market value. Appellants introduced testimony that his assessments were too low, but we find no solid ground upon which to rest a reversal of his judgment.

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[3] There was not a proper assessment of the banks in 1914. This was admitted upon the trial. Under the statute of the state (section 9134), the assessment should have been upon the shares of stock at the full and fair value, whereas it was made upon the basis of a per cent. of the capital stock. The chairman of the board of equalization admitted at once that the assessment was wrong, and said the error was because the board did not know any better, and was unable to construe the statute properly, and was never advised of its error by counsel until after the board had acted. The error does not invalidate the assessment. In Doty Lumber & Shingle Co. v. Lewis County, supra, the court said:

"The omission of the assessor to assess property, under a misapprehension of the law, will not invalidate the assessment list. It is the same in legal effect as the casual omission of property through a mistake."

It may be that there was some undervaluation of the plant of the Olympic Power Company; there probably was. The plant was built in 1910, but in 1912 the dam was broken and partly carried away, and as a result the value of the property was much impaired. However, there is nothing of substance to show that the assessment of the authorities was fraudulently made; and surely, when we consider the difficulty of valuing property in the condition existing when the assessment was made, the courts should not disturb the judgment of the local authorities.

We are not at all satisfied by the evidence that there was any corrupt combination between the assessor and the members of the board of equalization for the purpose of overvaluing appellants' lands, or discriminating in any way against them and in favor of other property. The appellants went to the pains of sending an agent from Portland to Port Angeles in 1914 to inquire into real estate values thereabouts. He went and talked with the county assessor and other officials and persons, and assumed to narrate many conversations with the officials, wherein they made statements to the effect that timber was assessed more than any other property, and town property at less than half its real value, which it is now sought to use as admissions by them of intentional undervaluations of town and other property. The officials positively deny many of the statements attributed to them, and declare that they never made statements intending to convey the meanings which the investigating witness gave to them. The District Court rejected the theory of conspiracy, and, without elaborating the evidence introduced by the several parties, our opinion accords with that of the lower court. Granting that, unexplained, much of what the main witness for the plaintiffs testified to tended to show wrongful concert of action, nevertheless the officials met the issue of intentional wrong in a way which dispelled any fair inference of corruption on their part. Olympia v. Stevens, 15 Wash. 601, 47 Pac. 11.

What we have said pertains sufficiently to the more important features of the appeal, and leads us to the conclusion that, while the evidence abounds in diversity of opinions as to correct values, those adopted by the officials are sustained as true to a greater or less de-

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gree. Appellants went before the board of equalization, and must now abide by their judgment. If there were some overvaluations or undervaluations, they are to be attributed to mistakes of judgment, and, in the case of the bank stock values, to honest misconstruction of law, but not to intentional, or arbitrary, or fraudulent, overvaluation or omission. And as the evidence fails to show discrimination against the property of any class or owner, or that any fundamental principle of uniformity was violated, the appellants are not entitled to relief in equity. C., B. & Q. Ry. Co. v. Babcock, 204 U. S. 585, 27 Sup. Ct. 326, 51 L. Ed. 636; Templeton v. Pierce County, 25 Wash. 377, 65 Pac. 553; Vancouver Waterworks v. Clark County, 55 Wash. 112, 104 Pac. 180; N. P. R. Co. v. Pierce County, 55 Wash. 108, 104 Pac. 178; Mercantile National Bank v. New York, 172 N. Y. 35, 74 N. E. 756.

The decrees are affirmed.

(245 Fed. 411)

VEZINA v. UNITED STATES et al.

(Circuit Court of Appeals, Eighth Circuit. August 15, 1917.)

No. 4725.

1. INDIANS ⟹1—PERSONS ENTITLED TO ALLOTMENTS AS INDIANS—EVIDENCE. In a suit to establish plaintiff's right to an allotment of land in the White Earth Indian reservation, evidence *held* to show that plaintiff was by blood a member of a band of the Chippewa Indians of Lake Superior.

2. INDIANS ⟹1—PERSONS ENTITLED TO RIGHTS OF INDIANS—ABANDONMENT. Under Act June 7, 1897, c. 3, 30 Stat. 90 (Comp. St. 1916, § 4106), providing that all children born of a marriage between a white man and an Indian woman by blood, where such Indian woman is, or was at the time of her death, recognized by the tribe, shall have the same rights and privileges to the property of the tribe to which the mother belonged as any other member of the tribe, where plaintiff's mother, until her marriage to a white man, was fully recognized as a member of a band of Chippewa Indians, and there was nothing to indicate that she ceased to be so recognized up to the time of her death, plaintiff was entitled to be recognized and treated as a member of such band of Indians, though she did not remain with the tribe on their reservation, especially as an Indian, who has abandoned his tribe and taken up his abode among the white race, and recognizes no authority over him except that of the United States and the state in which he resides, cannot become a citizen of the United States, in the absence of a statute or treaty, and forfeiture of tribal citizenship by one who cannot acquire any other citizenship should not be found upon light and trifling circumstances.

Appeal from the District Court of the United States for the District of Minnesota.

Suit by Elizabeth Vezina against the United States and S. E. Mooers. From a judgment for defendants, plaintiff appeals. Reversed and remanded, with directions.

F. H. Peterson, of Moorhead, Minn., for appellant.

Alfred Jaques, U. S. Atty., of Duluth, Minn., for the United States.

R. J. Powell, of Minneapolis, Minn., and Clayton C. Cooper, of Mahnomen, Minn., for appellee Mooers.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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Before HOOK and SMITH, Circuit Judges, and AMIDON, District Judge.

SMITH, Circuit Judge. On August 15, 1894 (28 Stat. 286, 305, c. 290, § 1), and on February 6, 1901 (31 Stat. 760, c. 217, § 1 [Comp. St. 1916, § 4214]), Congress enacted:

"That all persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper Circuit Court of the United States; and said Circuit Courts are hereby given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty."

This action was brought under that statute.

The plaintiff on March 15, 1889, moved to the Chippewa reservation at White Earth, Minn., and took up her home at the town of White Earth in a house erected by her husband, and there remained until about 1902 or 1903. Her husband moved back to Minneapolis and died there, but she remained on the White Earth reservation. In 1903 she moved to the west half of the northeast quarter, and the southeast quarter of the northwest quarter, and the south half of the north half of government lot 3 in section 2, township 146, range 40 west of the fifth principal meridian. She there made improvements, consisting of a house and two barns, which have been burned down, built a barbed wire fence, and grubbed the timber and brush from about 1½ acres of land. Her improvements were worth about $800. She has remained on these lands ever since. About 1909 the said lands were allotted to one Pah-dub, and were subsequently patented to him and sold to the defendant S. E. Mooers. The plaintiff is now 88 years old, and was 85 at the time of the trial.

Bearing in mind her life and attainments, it is manifest that as to the proof of her pedigree and family history the rule as to hearsay has been greatly relaxed. Jones on Evidence, §§ 312 to 318; chapter 43. Chamberlayne on the Modern Law of Evidence, p. 4037; Greenleaf on Evidence (16th Ed.) vol. 1, pp. 197–203; Abbott's Trial Evidence (1st Ed.) p. 90 et seq.; Rice on Evidence (1st Ed.) pp. 413–419; 10 Ruling Case Law, 963–966; 16 Cyc. 1223–1235.

The case has under a special order of the court been submitted on a typewritten transcript. It is difficult to determine the exact facts. The transcript is filled with typographical errors. Many mistakes have been made in the examination of the witnesses. For example, one of the questions refers to Commissioner Fletcher whereas it is quite manifest it was meant to refer to Congressman Fletcher; but greater difficulties than these are found in the transcript. Plaintiff does not speak the English language and testified through an interpreter. Many of the witnesses are in part of Indian blood, and their English is not of that clearness which could be desired; but, bearing the rules in the authori-

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ties cited in mind, we have no doubt the evidence shows the plaintiff was born on the Red river, in Canada, near Ft. Garry or Winnipeg, to Michael Delaney and his wife, Isabel Delaney; her mother, Isabel Delaney, was born about the first of the nineteenth century at Fond du Lac, Minn.; Mrs. Delaney's maiden name was Isabel Bazille; the maiden name of the plaintiff's grandmother, the mother of Mrs. Delaney, was Therease Cotte; she was married to a full-blood Indian named Kah-we-tah-wah-mo, a member of the Fond du Lac band of the Chippewas of Lake Superior. See 10 Stat. 1109, 1110, subd. 4, art. 2. For aught that appears he and his wife were always fully recognized as members of that band and tribe. It seems probable that Mrs. Bazille had Indian blood as well as her husband. She looked like an Indian woman; she had black hair, which she wore down her back, wore moccasins, and, besides doing her domestic duties, did a great amount of bead work and was an Indian doctor. They lived in a tepee. Mrs. Bazille died at Fond du Lac. Their daughter, Isabel, was at the age of 14 married to Michael Delaney, a Canadian Frenchman, who was by occupation a mason. Mrs. Delaney was one-half to three-fourths Chippewa of Minnesota. She wore her hair down her back, made moccasins for sale, did bead work and sold the same, and like her mother, aside from domestic duties, was an Indian doctor and midwife; she walked pigeon-toed, as most Indian women do; she frequently went from Fond du Lac to the Red river to make maple sugar before and after her marriage; she lived in a tepee. Shortly after her marriage, there being substantially no work in Mr. Delaney's line in Fond du Lac, they went up on the Red river in Canada near Ft. Garry or Winnipeg, and he worked there on the fort and made some tombstones. When they started from Fond du Lac to Red river, they first traveled with a dog team, and when they came to the river they crossed it in bark canoes, and then carried the canoes to the next lake until they got through. Eight children were born to them while they were living in Canada; the plaintiff being probably the third. She was born about 1828 or 1829. When plaintiff was about 19 her father moved back, about 1850, to Minnesota and secured work on Ft. Snelling. Two years later his wife joined him and there bore him two more children. Plaintiff remained about two years longer with her aunt, until her parents were settled at St. Paul. and then by their direction she joined them and remained with them a couple of years, when she was married to Joseph Vezina, a Canadian Frenchman, a carpenter, millwright, railroad bridge builder, and farmer, and they moved to Mendota, and later to Minneapolis. In the meantime, and about ten years after they had settled at St. Paul, the Delaneys moved to Rice Lake, about 18 miles from St. Paul, and to a farm. There they remained several years, when they moved to Minneapolis, where Mr. Delaney died, and his wife followed him about 1875. She also looked like an Indian squaw; she wore no stockings, but in winter wore cloths wrapped about her legs to protect her from the inclemency of the weather. While the plaintiff and her family were living at Mendota, her mother received an allotment of goods from the government, consisting of blankets, gingham, and calico, which she divided with the plaintiff. One witness says Mrs. Delaney

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was about three-fourths Indian by blood, more like a full-blood than three-fourths, and she acted like a squaw. At one time Mrs. Delaney showed Louis Hamlin what she claimed was some scrip issued to her by the government. Nearly all of Mrs. Delaney's and the plaintiff's brothers and sisters married Indians or mixed-bloods. In her youth Mrs. Delaney frequently went out with others on buffalo hunts, carrying a pack on her back; she smoked a red clay pipe. Through their lives, and in the various places where they have lived, Mr. and Mrs. Delaney and Mr. and Mrs. Vezina lived the greater portion of the time since they quit the tepee stage in log cabins.

Prior to October, 1863, there was issued to the plaintiff, under the seventh clause of the second article of the treaty of September 30, 1854 (10 Stat. 1109), as a mixed-blood Chippewa of Lake Superior, scrip for 80 acres of land, certificate No. 119. This scrip was located in October, 1863, on land in the Stockton land district in California by William S. Chapman, attorney in fact. A patent was issued on this land, but on May 8, 1879, the same was canceled. A careful reading of subdivision 7 of article 2 of the treaty (10 Stat. 1109) will show it did not contemplate the issuance of scrip at all. There was issued, however, to 278 persons what was known as "Gilbert scrip." On March 19, 1872, the Secretary of the Interior ruled that:

> "All the so-called scrip issued under this treaty, except such as is denominated the 'Gilbert scrip,' is so tainted, by the actual and clearly established frauds practiced in issuing it under the construction before referred to, as, in my opinion to deprive these certificates of any value or validity, even for the purpose of determining the identity of the persons entitled to the benefits of the treaty. Therefore, besides reversing the construction of the treaty under the decision of Secretary Usher as aforesaid, I have to direct that all the so-called 'scrip' forming the subject of your report and that of the commissioners before referred to, except the 'Gilbert scrip,' be declared illegal, fraudulent, and void, and all entries of land made with such scrip and unpatented should be canceled."

While certificate No. 119 was declared illegal and void, there is no finding that plaintiff was personally guilty of any fraud; but it clearly appears that as early as 1863 the plaintiff claimed to be a mixed-blood of the Chippewas of Lake Superior, and, although it had no right to issue any scrip upon such a claim, the government recognized the truth of her claim that she was a mixed-blood Chippewa of Lake Superior, and in declaring the scrip void did not declare otherwise. Mrs. Delaney talked Chippewa and broken French, while Mrs. Vezina talked French and broken Chippewa.

On January 14, 1889, Congress passed "An act for the relief and civilization of the Chippewa Indians in the state of Minnesota." 25 Stat. 642, c. 24. This act provided for the appointment by the President of three commissioners to negotiate with all the different bands and tribes of Chippewa Indians in the state of Minnesota for the relinquishment of all their interest in the state, except in the White Earth and Red Lake reservations. Section 3 of this act provides that after the compliance with certain specified terms all of the Chippewa Indians of Minnesota, except those in the Red Lake reservation, be removed to and take up their residence on the White Earth reservation and that they should be allotted lands in severalty in conformity with

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Act Feb. 8, 1887, c. 119, 24 Stat. 388. The act (25 Stat. 642), in its first section, provides that, for the purpose of making the allotments and for other purposes, the commissioners should make a census of the Indians. The President appointed under the act the following persons, who served as commissioners for the time indicated: Hon. Henry M. Rice, February 26, 1889, to May 29, 1891. Bishop Martin Marty, February 26, 1889, to June 22, 1893. Hon. Joseph B. Whiting, February 26, 1889, to January 10, 1891. Hon. Darwin S. Hall, May 29, 1891, to April 15, 1893. Hon. Francis Campbell, January 10, 1891, to April 22, 1892. Hon. Rockwell J. Flint, April 22, 1892, to September 22, 1893. Hon. William M. Campbell, April 15, 1893, to November 30, 1894. Hon. Benjamin D. Williams, June 22, 1893, to June 10, 1896. Hon. J. Montgomery Smith, September 22, 1893, to June 10, 1896. Hon. Melvin R. Baldwin, February 15, 1895, to July 28, 1897. Hon. Darwin S. Hall, July 28, 1897, to December 31, 1899.

On November 21, 1889, the commissioners, then consisting of Hon. Henry M. Rice, Bishop Martin Marty, and Hon. Joseph B. Whiting, and 123 adult Indians of the Fond du Lac band of Chippewas of Minnesota, by agreement ratified the act of January 14, 1889 (25 Stat. 642), and the Indians ceded to the United States all of their former reservation in Minnesota. As already stated, between the passage of this act of Congress and the making of this treaty or agreement, the plaintiff, on March 15, 1889, moved to the White Earth reservation, and she has lived there ever since, more than 25 years at the time of the trial of this cause in the District Court, and now more than 28 years.

The law did not call for the consent of the Indians to the making of the list for allotment. That power was solely vested in the commissioners, but they wisely in the main decided to take the advice of an Indian council, not with the old White Earth Indians, but of the new and old occupants of that reservation. There was considerably more land in the reservation than was required for allotment. The act (25 Stat. 642) provided for the sale at public auction of the pine lands of the reservation, at not less than their appraised value, and the entry of the agricultural lands under the homestead law, but required each homesteader to pay $1.25 per acre for his land. The act further provided that the proceeds of the sale of pine lands and agricultural lands should all be to the ultimate benefit of the Chippewas of Minnesota. Thus every member of the council acquired a direct personal interest adverse to any claimant to an allotment in the loss which would result to the residue if allotments were allowed which would reduce the lands which belonged under the act to the Indians in common. The Indians were much divided as to Mrs. Vezina's claim to be listed with the commissioners and to giving her an allotment. White Cloud, the principal chief, after making personal investigation, was in her favor, as were many more of the Indians, and the proceedings of the first council, if ever recorded, are not in evidence. Suffice it to say they never voted to recommend that Mrs. Vezina be put upon the list. The council of June 1, 1907, rejected her, and in later years the council constantly referred the matter back to the government. After liv-

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ing at the town of White Earth on the reservation, in a house which they had been expressly permitted to build by the chief, and apparently at least with the acquiescence of the Indian agent and commissioners, for 13 years or more, she moved to the land in question about the time of her husband's death. The description of the land upon which she located was furnished her by Joseph Perrault, who was employed at the government agency.

On September 2, 1892, Chairman Hall of the commission, and on June 20, 1894, Chairman Campbell of the commission, reported adversely on Mrs. Vezina's claim, and these decisions were sustained by the Indian Office. On May 27, 1895, Chairman Melvin R. Baldwin of the commission reported he believed the plaintiff's mother was a member of the Chippewa tribe, and that the chiefs and head men of the Mississippi band had petitioned for the enrollment of plaintiff, and recommended that she be enrolled and allowed all the rights and privileges granted the Chippewas of Minnesota under the act of January 14, 1889. On June 8, 1895, the Acting Commissioner of Indian Affairs overruled the chairman of the commission in this regard.

Without stopping to discuss whether under the act of Congress in question he had any such power, at about this same time, but possibly before the action of the department, Mr. Baldwin told the plaintiff to go back to her land and she would never be molested. On December 21, 1898, the plaintiff having made application under clause 2 of the second article of 10 Stat. 1109, the Commissioner of Indian Affairs submitted the claim to the Secretary of the Interior, who disallowed her claim upon the ground of an absence of evidence, rather than upon a finding adverse to her upon affirmative evidence. On January 27, 1899, the Assistant Commissioner of Indian Affairs wrote Hon. Darwin S. Hall, who was, it will be remembered, a member of the commission from May 29, 1891, to April 15, 1893, and from July 28, 1897, to December 31, 1899, and who was at the time in question chairman of the Chippewa Commission. In this letter it was recited:

> "As you are aware, Mrs. Vezina's claim for enrollment and for an allotment under the act of January 14, 1889, has three times been investigated by the Chippewa Commission and as a result of these investigations the commission has each held that Mrs. Vezina was not entitled to enrollment. In this conclusion the office concurred each time."

The letter further recited that Congressman Loren Fletcher had written the Indian Office about the matter and it had been decided to consider his letter as an appeal. It will be observed that this letter stated that the commission had each of three times held that Mrs. Vezina was not entitled to an enrollment. It will be remembered that this is an inaccurate statement. It is true the commission had twice so reported, but the last report had been favorable to her claim and been overruled by the Indian Office. On March 24, 1900, upon an application for a rehearing all the papers in the case were referred to Commissioner Hall, who, it will be recalled, had made the first investigation in which a report was made adverse to her claim. On July 18, 1900, Commissioner Hall made a report, reversing the former one and recommending that Mrs. Vezina be enrolled. His new report was

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overruled by the Indian Office and the Acting Secretary of the Interior. On June 20, 1903, Simon Michelet, United States Indian agent at the White Earth reservation, gave a certificate that he was satisfied that Mrs. Vezina was entitled to locate lands under the seventh clause of the treaty of September 30, 1854. On May 6, 1904, the office of Indian Affairs wrote to Mr. Michelet that the claim of the Vezinas had been several times passed upon, and it had been determined that they were not entitled to enrollment, and that "no countenance or sanction whatever must be given to their pretended claim or right to occupy lands on the White Earth reservation." In October, 1907, the Acting Commissioner of Indian Affairs wrote to the superintendent in charge of the White Earth agency that a petition for rehearing had been filed in the Vezina matter through the President, and added:

"In view of the facts stated in the petition, that these people have actually resided on the lands they are claiming as allotments for 17 years, and have added much value to them by cultivation and improvements, the office feels disposed to again let their cases be presented to a general council of the White Earth Indians. The papers are accordingly sent to you herewith. You are instructed to present the Vezina cases to the next general council of the White Earth Indians. You are requested at your earliest convenience to notify Mrs. Vezina and the members of her family (not including grandchildren) who have made actual settlement in the White Earth reservation of the action taken, and warn them that they should be prepared to properly present their case to the next general council. You are instructed further that you should seasonably notify the Vezinas of the date when the council will convene. As far as practicable you should co-operate with these claimants in a proper presentation of their case to the council when it convenes. These instructions do not mean that a special council shall be called to hear these cases, but simply that they should be presented at the next general council that is convened."

On January 20, 1908, the Acting Commissioner of Indian Affairs wrote to the superintendent in charge of the White Earth agency:

"I send you herewith, for proper action, a letter from Mrs. Elizabeth Vezina and family, dated Langby, Minn., January 8, in relation to the enrollment of herself and children with a view to procuring allotments under the provisions of the act of Congress of January 14, 1889 (25 Stat. 642). The case is an old one, as you know; considerable correspondence having passed between the Chippewa Commission and the office and your agency and the office in relation thereto. With your letter of July 12, 1907, you transmitted to the office a certified copy of the proceedings of a general council of the White Earth Band of Chippewa Indians held on June 1, 1907, to take action on matters of general interest to the tribe, and to pass on the rights of applicants for enrollment, etc. Included in the list were the applications of the Vezina family, which had been rejected by the council. The Acting Secretary of the Interior approved the action of the council, and you were so advised on August 22. It appears that these people have lived on the reservation for 18 years. It is assumed that they are now in possession of the lands originally chosen as their allotments. After all these years of residence on and improvement of the lands selected, it would be a great calamity to them to have to surrender the lands. Mrs. Vezina is now 79 years of age and getting quite feeble. The office feels much sympathy for her, and believes she and her children—but not her grandchildren—should be enrolled and allotted the lands they have so long occupied. You are therefore requested to present the application of Mrs. Vezina and her family for enrollment for the action of the next general council of the White Earth Indians, and urge favorable action thereon."

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On January 28, 1908, Simon Michelet, superintendent of the White Earth agency wrote the Commissioner of Indian Affairs as follows:

"In reply to office letter of January 20, 1908, marked 'Land Office 2562–1908, File 053,' subject 'Relative to enrollment of Mrs. Elizabeth Vezina and family,' in which you inclose a letter from Mrs. Vezina to the President of the United States, I have the honor to report that I called a general council of all of the Indians of the White Earth reservation, to be held at White Earth agency on December 28, 1907, for the purpose of passing upon applicants for enrollment, of which I had a number on file awaiting a hearing at the general council. I stated in the notice that the council was called for the purpose of passing on applicants for enrollment. In order that you may know how the Indians feel regarding enrollment, I will say that no one attended this council, or appeared, except one or two chiefs. Those two present agreed to call a council a few days later; these two chiefs notified all of the other chiefs and head men who generally attended the councils to be present but they failed to put in an appearance at the second called council. On Saturday, January 11, 1908, the Indians held a council at White Earth, and when I learned of it I sent word to the council that I desired to present a number of applications for enrollment. I was advised that they did not care to take up any of these applications and I have to state frankly that I do not believe that this old woman (Mrs. Vezina) should receive any encouragement whatever, if you intend to leave this matter to the council. They are so prejudiced and biased in acting upon these applications that it is simply impossible for any of these applicants to receive a fair hearing in regard to enrollment. It seems to me that your office has treated the Indians with courtesy when opportunity is granted for them to pass upon these applications, but when the Indians, in council, refuse to act, it seems to me that the obligation to treat with them further upon the subject ceases. I am fully satisfied that this old woman has rights on this reservation; there is no doubt about her Indian blood, and it is my humble opinion that she is entitled to enrollment, whether the Indians consent to her enrollment or not. It seems to me that it would be a good lesson to the Indians to enroll this woman, when they refuse to give her case the consideration it should have."

On December 1, 1908, John R. Howard, United States Indian agent, wrote to the Commissioner of Indian Affairs as follows:

"I have the honor to submit the minutes of a general council of the tribes of Indians belonging to the White Earth reservation, held, pursuant to call on October 1st and 2d for the purpose of acting upon the applications of various persons for enrollment on the tribal rolls, and for transacting any other business that might lawfully come before it. A number of applications were placed before the council and acted upon as follows: * * * Case No. 10. Elizabeth Vezina, This application has been rejected by a former council. The applicant and members of her family were all present with her attorney, but notwithstanding the order contained in your office letter of October 25, 1907 (Land 75, 755–1907), directing me to submit the matter to another council, and which letter was before them, the council absolutely refused to permit the matter to be brought before them. I understand that this matter is now definitely settled, so far as this office is concerned."

December 30, 1908, the Commissioner of Indian Affairs wrote the Secretary of the Interior as follows:

"This office is in receipt of a letter from John B. Howard, United States Indian agent, White Earth agency, dated December 1, 1908, submitting the minutes of a general council of the White Earth Chippewas of October 1 and 2, 1908. The council was called to consider the matter of the applications of various persons for enrollment as members of the tribe, with a view to procuring annuities and allotments under the provisions of the act of Congress of January 14, 1889 (25 Stat. 642), and the act of April 28, 1904 (33 Stat. 539, c. 1786). * * * The cases not receiving the sanction of the council are as follows: * * * Elizabeth Vezina and family. * * * In each of the

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above cases, from 8 to 12, inclusive, the agent recommended that the action of the council in rejecting the application, or applications, be approved. This recommendation is concurred in by the office. The action of the council in each of the cases referred to above, from 1 to 7, inclusive, seems to be justified by the facts developed by the evidence. It is thought, also, that the council was entirely justified in taking unfavorable action on each of the cases from 8 to 12, inclusive."

October 28, 1909, the Acting Commissioner of Indian Affairs wrote to Henry Vezina, son of plaintiff:

"Referring further to your letter of June 24, 1909, regarding the application of Mrs. Elizabeth Vezina for rights with the Indians of the White Earth reservation, you are informed that the superintendent of the White Earth reservation, in accordance with the request of this office, has made a further investigation with regard to the matter. In the report which has been submitted to the office, no additional evidence is submitted that would in any way modify or change the attitude of the department and the office with regard to the application of the members of the Vezina family for enrollment with the White Earth Bands of Chippewa Indians. The office would not be justified in recommending to the Secretary of the Interior that the case be reopened. In this connection your attention is called to the act of Congress of February 6, 1901 (31 Stat. 760), which provides: [Here follows a transcript of the statute in question under which this suit was brought, and the letter proceeds:] It appears to the office that this would be the simplest and most direct way of having the rights of your family determined to the White Earth reservation, and no objection would be interposed to a determination of your rights in the manner provided by this law. Members of your family have resided on the reservation for more than 18 years and the White Earth bands of Chippewa Indians claim that you should be excluded from the reservation, because you have not been enrolled with the tribe and therefore have no rights on the reservation. The question of the removal of the members of your family from the reservation has been considered several times, and unless your rights are determined without further delay it may be necessary to take such action in the near future. It is hoped, therefore, that this course will not be necessary, when there is ample opportunity for a determination of your rights in the manner indicated by the act of February 6, 1901, above cited."

On December 13, 1911, there was filed in the office of Indian Affairs the affidavit of Margaret Roy, 93 years old, a cousin of plaintiff, swearing that from common report in the family plaintiff was a mixed-blood Indian belonging to the Mississippi band of Chippewas of Minnesota and a granddaughter of Kah-we-tah-wah-mo, who was a full-blood member of said tribe.

[1] We are clearly of the opinion that the plaintiff is by blood a member of the Fond du Lac band of the Chippewas of Lake Superior. The evidence shows a considerable number of persons born off the reservation, and who reached middle life before the treaty of January 14, 1889, and who then moved to the reservation, were recognized, enrolled, and secured allotments upon the reservation. Two out of three of the commission reports were finally in her favor, and the Indian Office on January 20, 1908, urged favorable action upon her case. Simon Michelet, the Indian agent, reported in her favor.

[2] But it is contended that she and her mother abandoned their membership in the tribe: This is not specially pleaded by either of the defendants; but, even if it were pleaded, we have reached the conclusion that it is not sustained. The act of the Fifty-Fifth Congress (Act June 7, 1897, c. 3, 30 Stats. 62, 90 [Comp. St. 1916, § 4106) provides:

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"That all children born of a marriage heretofore solemnized between a white man and an Indian woman by blood and not by adoption, where said Indian woman is at this time, or was at the time of her death, recognized by the tribe shall have the same rights and privileges to the property of the tribe to which the mother belongs, or belonged at the time of her death, by blood, as any other member of the tribe, and no prior act of Congress shall be construed as to debar such child of such right."

Mrs. Delaney was up to at least her marriage fully recognized as a member of the Fond du Lac band of the Chippewas of Lake Superior and there is nothing to indicate that she ceased to be so recognized up to the time of her death. Under this statute Mrs. Vezina is clearly entitled to be recognized and treated in all respects as if she had remained upon the reservation. It is true that, if Mrs. Delaney was now living, under our decision in Oakes v. United States, 97 C. C. A. 139, 172 Fed. 305, Mrs. Vezina would not be entitled to be enrolled under this statute. That decision would probably exclude the children of Mrs. Vezina from the right to enrollment and from allotment. As there is no case before us now, except the case of Mrs. Vezina, we do not care to express a more definite opinion upon the question of her children. The Oakes Case, in place of being in favor of the defendants, is, in our view, directly against them. It is true that the Oakes Case held, and many statutes of the United States prior thereto recognized, that Indian citizenship could be abandoned; but it should be borne in mind that the inference of such abandonment should not be drawn from light and trifling circumstances. The Indians were a nomadic people, and a member temporarily absent from the reservation would not forfeit the right of an Indian as a member of the tribe. In the absence of a treaty or an act of Congress, Indians were not citizens of the United States; and, even though one has abandoned his tribe, and taken up his abode among the white race, and recognized no authority over him except that of the United States and the state wherein he resides, he is not, and cannot become, a citizen of the United States, in the absence of a statute or treaty to that effect. Elk v. Wilkins, 112 U. S. 94, 5 Sup. Ct. 41, 28 L. Ed. 643; Famous Smith v. United States, 151 U. S. 50, 14 Sup. Ct. 234, 38 L. Ed. 67.

The court should not find upon light and trifling circumstances that an Indian has forfeited his citizenship in his tribe and in no method acquired any other citizenship, but has become literally a man without a country. It should take especially strong evidence that an Indian woman has abandoned her tribe simply by living with her husband, which she ought to do by the laws of both God and man.

It is ordered that the decree of the District Court be reversed, and the cause remanded, with directions to enter a decree in harmony with this opinion in favor of the plaintiff.

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(245 Fed. 421)

SOUTHERN PAVING CONST. CO. et al. v. CITY OF KNOXVILLE, TENN.

(Circuit Court of Appeals, Sixth Circuit. October 2, 1917.)

No. 2968.

1. INSURANCE ⟹618—FOREIGN INSURANCE COMPANY—ACTION AGAINST—VENUE.

Under Shannon's Code Tenn. 1917, § 3292, subsec. 3, providing that a foreign insurance company, as a prerequisite to doing business in the state, shall file with the state insurance commissioner an instrument appointing him its attorney, on whom all lawful process in any action against it may be served, that the authority shall continue as long as any liability against the company remains outstanding in the state, and that any process issued by any court of record in the state, and served on the commissioner by the proper officer of the county in which the commissioner has his office, shall be deemed a sufficient process on the company, the company, after it has ceased to do business in the state, may, by process served on the commissioner, be sued in a county other than that in which the commissioner has his office.

2. INSURANCE ⟹618—FOREIGN COMPANY—PROCESS—COUNTERPART SUMMONS—VENUE.

Under Shannon's Code Tenn. 1917, § 6115, providing that suit in chancery court may be instituted wherever the defendant, or any material defendant, is found, unless otherwise prescribed by law, and section 6116, providing that counterpart summons may be issued to any other county for defendants not to be found in the county in which the suit is properly brought, neither of the defendants need be found in the county in which the suit is brought, if it is authorized by statute against one of the defendants in that county; so action in any county against a foreign insurance company, with service of process on the state insurance commissioner as its attorney, being authorized by section 3292, subsec. 3, suit on bond of a contractor to repair street in K. county, with a foreign insurance company as surety, may be brought in that county, and the contractor served with counterpart summons in another county, after the insurance company has ceased to do business in the state.

In Error to the District Court of the United States for the Eastern District of Tennessee; Edward T. Sanford, Judge.

Suit by the City of Knoxville, Tenn., against the Southern Paving Construction Company and another. Judgment for plaintiff, and defendants bring error. Affirmed.

See, also, 220 Fed. 236.

W. L. Frierson, of Chattanooga, Tenn. (Lewis M. Coleman, of Chattanooga, Tenn., of counsel), for plaintiffs in error.

W. T. Kennerly, Wm. Baxter Lee, and J. Pike Powers, Jr., City Atty., all of Knoxville, Tenn., for defendant in error.

Before WARRINGTON, MACK, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. The city of Knoxville commenced suit in the chancery court of Knox county, Tenn., December 30, 1913, against the Southern Paving Construction Company, a West Virginia corporation having its principal office in Chattanooga, and the Ætna Indemnity Company, of Hartford, Conn., as surety of the paving company, to recover upon a guaranty which the latter had given to the city

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to keep one of its paving districts in repair for a certain number of years. February 3, 1914, on petition of both defendant companies, the cause was removed to and docketed on the equity side of the court below. Prior to removal, on February 2, 1914, the paving company filed in the chancery court a plea in abatement, and after the removal, on March 28, 1914, the Ætna Company filed a similar plea in the court below. These pleas presented issues as to the right to commence or maintain the suit in Knox county, and so involved a question of jurisdiction in the court below. A number of steps were taken by the parties respectively in bringing this question to decision, and in the course of the proceedings the learned trial judge filed several carefully prepared opinions. It is enough to say of the proceedings that the cause was transferred from the equity to the law side of the court; that on January 13, 1915, the parties filed a written stipulation setting out the facts involved in the issues presented under the pleas in abatement, waiving a jury and agreeing to submission to the court; the pleas were overruled, on the ground that they were not sustained by the facts. The city thereupon changed its pleading into the form of a declaration, and to this the paving company demurred. The Ætna Company did not join in this demurrer, or appear again in the case until the petition in error herein was filed; judgment by default was entered against it on April 14th, subject to ascertainment of damages later; and on the 19th of that month, in accordance with an opinion of the trial judge, the demurrer of the paving company was overruled. Thereupon that company presented ten pleas to the declaration, to which the city filed replication in the following July. The cause was tried to the court and a jury in January, 1916, and a verdict rendered upon the issues joined in favor of the city and against both defendants, but assessing the damages against the paving company in the sum of $5,507.35 and against the Ætna Company as surety for $5,027.80, thus holding the paving company for $479.55 in excess of the sum assessed against its surety. Motion by the paving company for new trial was overruled in accordance with an opinion of the trial judge, and judgments against both defendants jointly for $5,027.80, and against the paving company for the further sum of $479.55, with interest, were entered upon the verdict. Both defendant companies prosecute error.

[1, 2] 1. Could the suit be maintained in Knox county? This must depend on the contractual relations of the parties to the suit, and certain statutory provisions of Tennessee. In 1906 the city and the paving company entered into a written contract for the improvement of certain paving districts of Knoxville, some with asphalt, and some with brick and asphalt, at specified prices payable according to approximate monthly estimates and ultimately upon final estimate. Among these districts was Park avenue (paving district No. 16), which was to be paved with asphalt (except between the outer rails of an existing double-track street railway and two strips of brick paving next to the outer rails) from Gay street to the Southern Railway bridge or viaduct, a distance of about 3,200 feet. The paving company agreed, for the considerations mentioned, to keep the pavement "in good repair at its own expense and free of all charge" to the city "for a period of five

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years from the date of the completion" of the improvement; and at the same time the paving company, as principal, and the Ætna Company, as surety, executed and delivered to the city a bond in the sum of $15,000, subject to a condition that should the paving company "guarantee, maintain, and keep repaired under the direction of the city engineer, for a period of five years, the paving done by them under said contract, then this obligation to be void; otherwise, to remain in full force and effect." Upon the claimed completion of the work on Park avenue, a controversy arose between the city and the paving company with reference to the work, which was settled and compromised on February 28, 1908, whereby it was agreed that the paving company's period of guaranty should be extended for an additional three years, thus making the entire repair period eight years; and a further bond in the sum of $10,000 was then executed and delivered to the city by the paving company, as principal, and the Ætna Company as surety, subject to condition similar in terms and additional to that mentioned in the first bond. The Ætna Company is a corporation of Connecticut, and concededly at the times the improvement contract and the two indemnity bonds mentioned were delivered, as stated, the Ætna Company was authorized by its charter and qualified under the statutes of Tennessee so to obligate itself; but when the present suit was begun the Ætna Company had withdrawn from business in Tennessee and had no agent in that state, except, as shown below, the state insurance commissioner of Tennessee.

In 1901 the Ætna Company was admitted to do business in Tennessee, and as a condition precedent it filed with the insurance commissioner of that state a power of attorney, dated May 21, 1901, authorizing the insurance commissioner or his deputy—

"to acknowledge service of all legal process * * * for and in behalf of it * * * in said state of Tennessee, in any judicial proceeding which may, within the state of Tennessee, be instituted against it, the said company, or to which it may be a party; and the said * * * company does hereby, in consideration of the privilege of doing business in said state, * * * consent to and with said state of Tennessee, for the benefit of all persons concerned, that service of any such process upon such insurance commissioner or deputy * * * shall be taken and held to be as valid as if served upon" the company, "according to the laws of said state of Tennessee, or of any other state; and the said * * * company does hereby further consent that in case it * * * shall cease to transact business in the said state * * * said insurance commissioner and deputy * * * shall be considered and held as continuing to be attorney" for the company "for the purpose of process * * * in any action against it * * * upon any policy or liability issued or contracted during the time the said company transacted business" in the state.

This power of attorney has not been revoked; and it was given and received pursuant to paragraph 3 of section 9, chapter 160, Tennessee Acts of 1895 (page 327; see, also, section 3292, par. 3. Shan. Code [Ed. 1917]). This statute provides among other things:

"Any process issued by any courts of record in this state, and served upon such commissioner by the proper officer of the county in which said commissioner may have his office, shall be deemed a sufficient process on said company, and it is hereby made the duty of the insurance commissioner, promptly,

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after such service of process by any claimant, to forward, by registered mail, an exact copy of such notice to the company."

Concededly the chancery court of Knox county is a court of record, and, apart from the question whether the present suit could be maintained at all in Knox county, its jurisdiction embraces such suits as this. See Shan. Code, § 6109. Section 6115 provides:

"The court of chancery acts ordinarily in personam, and suit may be instituted wherever the defendant, or any material defendant, is found, unless otherwise prescribed by law."

Section 6116:

"Counterpart summons, accompanied by copies of the bill, may be issued to any other counties of the state for defendants not to be found in the county in which the suit is properly brought." [1]

As we have seen, the original bill was filed in the chancery court of Knox county on December 30, 1913. January 2, 1914, process issued to Hamilton county for the paving company, and both to Knox and Davidson counties for the Ætna Company, and was served on the former in Hamilton county, January 6th, and on the insurance commissioner of Tennessee, in Davidson county, January 7th; the commissioner acknowledging and accepting such service. As already stated, the paving company filed its plea in abatement in the chancery court of Knox county February 2, 1914. It was in substance alleged in the plea that neither the paving company nor any other defendant resided in Knox county or had any office or agency there; that counterpart summons for the paving company issued to Hamilton county and was served upon it there; that original process was issued in Knox county for the Ætna Company and subsequently served upon one McMillan, who was described in the sheriff's return as "the last agent and officer" of the Ætna Company "to be found in my county"; that McMillan was not, however, when the bill was filed or when the process was served, an agent or officer of the Ætna Company; that counterpart process for the Ætna Company was issued to Davidson county and service thereof acknowledged in that county by the insurance commissioner of Tennessee, who assumed "to act under a power of attorney for that purpose." The prayer was whether, since the suit "was not brought in a county in which this defendant or any other material defendant was found," the paving company should answer further. The Ætna Company, appearing only for the purpose of its plea in abatement, presented in its plea allegations substantially like those contained in the plea of the paving company, except that the Ætna Company alleged "that process issued for it, at the same time, to both Knox and Davidson counties," and, it is to be particularly noticed, this exception is in accord with the

[1] This section being limited to suits "properly brought" renders it unnecessary to consider the broader section (4526) cited by counsel. Section 4526 provides as follows: "When there are two or more defendants in any suit in courts of law or equity, or before justices of the peace, the plaintiff may cause counterpart summons or subpœna to be issued to any county where any of the defendants are most likely to be found, the fact that the counterpart process is issued in the same suit being noted on each process, which, when returned, all be docketed as if only one process had issued."

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stipulation; hence the allegation of the paving company that counter summons for the Ætna Company was issued to Davidson county is to be treated as a mistake.

It is true that McMillan had not been an agent of the Ætna Company since March 12, 1908, and it must be conceded that service upon him was not effective; but it does not seem to us that this is decisive of the question whether the suit was rightly instituted in Knox county. When the suit was begun the paving improvement contract and the indemnity bonds were subsisting obligations of the two defendant companies as respects the guaranty repair period; and we do not see how the Ætna Company can be heard to say that the admitted service of process on the insurance commissioner was not binding upon it in the present suit. It was required under the statute of 1895, as a condition to its right to do business in Tennessee, to constitute and appoint the insurance commissioner or his successor its true and lawful attorney upon whom lawful process in any action against it might be served, and also to agree that such service "shall be of the same force and validity as if served on the company" and that the authority so given should "continue in force, irrevocably, as long as any liability of the company remains outstanding" in Tennessee. The statute simply requires that the process so issued shall be by a court of record of the state; it does not prescribe the county in which the suit shall be brought; it requires only that service shall be made upon the commissioner of insurance by the proper officer of the county in which he may have his office, and this would seem to have been in effect carried out. As Judge Sanford said, when considering this feature of the case upon demurrer to the replication of the city to the plea in abatement:

"It having been conceded at the hearing that the indemnity company is a foreign insurance company within the meaning of that act (Acts 1895, c. 160, par. 3, pp. 322, 327), this question is, I think, ruled by Patton v. Casualty Co., 119 Tenn. 364, 373, 104 S. W. 305, in which it was held that a nonresident holder of an insurance policy might, under this act, sue in Tennessee a foreign insurance company upon a foreign cause of action, and, further, that in such suit brought in Washington county, Tenn., the acknowledgment of service of the process by the insurance commissioner residing in Nashville, Davidson county, Tenn., 'was properly made, and the company was brought before the court.'"

To the same effect is the ruling in Mutual Reserve, etc., Ass'n v. Phelps, 190 U. S. 147, 149 top, 157, 23 Sup. Ct. 707, 47 L. Ed. 987.

True, it is strenuously urged that the essential basis for issuing counterpart summons, say as here to the paving company, is the commencement of a suit in a county where a necessary defendant is "found." This overlooks important parts of sections 6115 and 6116 above quoted. The first of these sections provides that the suit may be brought where any material defendant is found, "unless otherwise prescribed by law," and the latter authorizes the issue of counterpart summons to any other county for a defendant not found in the county where the suit is "properly brought." If any effect is to be given to the words "unless otherwise prescribed by law" (section 6115), it is plain that where a suit is instituted and process served in accordance with another statute of the state the suit must be treated as "properly brought" within the

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meaning of section 6116; and enough has already been pointed out to show that the procedure taken against the Ætna Company was sanctioned by the insurance act; in other words, such procedure was "otherwise prescribed by law." It hardly need be added that if the suit was "properly brought" in Knox county, the paving company was open to counterpart summons in Hamilton county; the law (section 6116) is so written. This harmonizes all the statutory provisions alluded to, while any other interpretation would frustrate the manifest object of the mode of service prescribed by the insurance act. Furthermore, we agree with Judge Sanford, who said of this feature of the case:

"The effect of the insurance act of 1895 is, as stated, to permit the suit to be 'properly brought' against the indemnity company in Knox county, although apparently not technically 'found' therein. And this being so, the suit was hence not only 'properly instituted' in that county against the indemnity company, but under the express provision of section 4306 (now 6116) counterpart summons may issue to another county for the construction company, the condition of the issuance of such counterpart summons not being that another material defendant is 'found' in such county, but that the suit was 'properly brought' in such county. This question is, I think, also ruled by University v. Cambreling, 6 Yerg. (Tenn.) 79, 85. This was a suit in chancery brought in Maury county against two defendants. The one, the University of North Carolina, a foreign corporation, entered its appearance. The other, an individual defendant, was served with a subpœna in Weekly county, outside of the chancery district. It was held that under these circumstances the court had acquired jurisdiction over the resident defendant. Catron, Judge (afterwards Mr. Justice Catron), delivering the opinion, said: 'But the university appeared. This was equal to service of a subpœna within the jurisdiction. The court, having power over one defendant, of course, has jurisdiction of all other material parties, no difference in what part of the state they reside; were it not so, justice would be defeated in most cases for want of parties necessary to a final decree.' The second ground of this opinion is, I think, in exact accord with the provisions of section 4306 (6116) of the Code, and is not a mere dictum, but one of the grounds of decision, and hence conclusive of the present question. And I find nothing to the contrary in Carlisle v. Cowan, 85 Tenn. 165, 2 S. W. 26, involving merely the general rule that the right of suit in transitory actions follows and does not precede the person of the defendant, a rule necessarily abrogated by the act of 1895 in suits against foreign insurance corporations."

Moreover, when speaking of the right to issue counterpart summons, the trial judge further held:

"Thus a statute providing for suit in any district gives, by necessary implication, the right to issue process beyond the district. United States v. Congress Const. Co., 222 U. S. 199, 203, 32 Sup. Ct. 44, 56 L. Ed. 163. And this construction is in accordance, not only with Life Ins. Co. v. Spratley, 99 Tenn. 332, 335, 42 S. W. 145, and Patton v. Casualty Co., 119 Tenn. 364, 373, 104 S. W. 305, but, as I think, with the uniform practice in Tennessee, and the view generally entertained both by the bar and the bench since the passage of the act of 1895. And the fact that the bill alleged that McMillan was an agent of the company in Knox county does not, I think, militate against the validity of the service of process upon the indemnity company by service upon the insurance commissioner, the insurance act of 1895 providing an additional mode of obtaining jurisdiction over the defendant. See, by direct analogy, Mutual Reserve Ass'n v. Cleveland Mills (6th Circt.), 82 Fed. 508, 511, 27 C. C. A. 212, involving the effect of the Tennessee act of 1875 (chapter 66)."

The weight of Judge Sanford's opinion is augmented by his familiarity with the practice prevailing, as he says, in Tennessee; even then, if counsel for the companies be right in saying that the Supreme Court

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of the state has not distinctly passed upon the precise question involved here, still in such a situation, the consensus of opinion of the bar and the *nisi prius* courts may generally be accepted as a safe guide in the construction of state statutes. Upon the whole, we conclude that the suit could be maintained in Knox county as against both defendant companies.

2. Upon careful study of the merits of the case we are convinced that it is ruled by the decision of this court in City of Akron v. Barber Asphalt Paving Co., 171 Fed. 29, 96 C. C. A. 271. The controlling facts of the two cases are in principle the same, and a discussion here either of the facts or the applicable law can serve no useful purpose. We do not overlook the insistence that the excess, $479.55, with which the paving company is charged, is without evidential support. We are satisfied that this view cannot be sustained; and it scarcely need be said that this court cannot weigh the evidence.

The judgment must be affirmed.

(245 Fed. 427)

WESTWATER v. MURRAY.

(Circuit Court of Appeals, Sixth Circuit. October 2, 1917.)

No. 3010.

1. JUDGMENT ⟹818(6)—FOREIGN JUDGMENTS—ACTION ON—INQUIRY INTO JURISDICTION.

   In an action to recover upon a judgment rendered by a court of another state, inquiry may be made into the court's jurisdiction over the person of the defendant; but such inquiry involves all the usual tests for determining such jurisdiction.

2. COMPROMISE AND SETTLEMENT ⟹20(2) — PERFORMANCE OR BREACH OF AGREEMENT.

   An action by the receiver of a national bank was settled by a cash payment and the execution of a cognovit note for $3,000, under an agreement that, if defendant failed to make the payments called for, the receiver might forfeit the first payment and prosecute the original suit to final judgment, but that, if both payments were made, he should apply to the court for ratification and approval of the settlement, and, if approved, have the case marked "Settled and discontinued," or, if not approved, refund the money paid. *Held* that where defendant did not pay the note, it was not a violation of the agreement for the receiver to secure the court's approval of the settlement and have judgment entered on the note.

3. JUDGMENT ⟹817—FOREIGN JUDGMENTS—FULL FAITH AND CREDIT—PUBLIC POLICY.

   An Ohio court will enforce, and under the full faith and credit clause of the federal Constitution must enforce, a judgment rendered in Pennsylvania on a cognovit note made and payable in Pennsylvania, though the note contained a provision for an attorney's fee, and though such fee is included in the judgment; such a provision being valid in Pennsylvania, though against public policy in Ohio.

4. BILLS AND NOTES ⟹113—DEFENSES—LACHES IN PRESENTING DEFENSE.

   Defendant was sued in Pennsylvania by the receiver of a national bank; the petition setting out what purported to be a complete copy of the note sued on. Defendant filed pleadings in effect admitting the genuineness of the note. The case was twice tried, and twice passed on by the

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court on appeal, and defendant testified at each trial without raising any question or claim of forgery. After the case was sent back for a third trial, it was settled by the execution of a cognovit note, on which judgment was entered nearly a year later. When sued on such judgment in Ohio, defendant for the first time, nearly seven years after the claimed execution of the note, alleged that it was a forgery, claiming that he executed a note of a different date, that a number of other notes were forged, and that he believed that the note sued on was the genuine note. *Held*, that this defense was barred by laches; no excuse being given for defendant's obvious negligence in not discovering the alleged forgery.

5. JUDGMENT ⟹822(3)—FOREIGN JUDGMENT—MATTERS CONCLUDED.
The judgment rendered upon the cognovit note by a court having jurisdiction was conclusive on the issue of forgery, in view of defendant's laches.

6. PLEADING ⟹214(7)—ADMISSIONS BY DEMURRER—FACTS NOT WELL PLEADED.
Fraud in obtaining the judgment on the cognovit note was not well pleaded, so as to be admitted by demurrer, where there was no allegation that the receiver had the slightest knowledge of the charge of forgery, or that he resorted to any deception or other act inconsistent with fair dealing.

7. ABATEMENT AND REVIVAL ⟹41—TRANSFER OF JUDGMENT SUED ON.
Under Gen. Code Ohio, § 11261, providing, relative to the abatement of actions, that on any transfer of interest, other than those specified therein, the action may be continued in the name of the original party, or the court may allow the transferee to be substituted, an action on a judgment did not abate because of a sale and transfer of the judgment during the pendency of the action.

8. APPEAL AND ERROR ⟹1041(3)—PLEADING ⟹236(6)—AMENDMENTS—DISCRETION OF COURT—HARMLESS ERROR.
In an action on a judgment on a note given in settlement of an action on a larger note, the refusal to permit an amendment to the answer and cross-petition, to allege that the original note had not been returned to defendant, was at most harmless error, and was within the discretion of the court.

In Error to the District Court of the United States for the Eastern Division of the Southern District of Ohio; John E. Sater, Judge.

Action by Charles C. Murray, receiver of the Cosmopolitan National Bank of Pittsburg, against James Westwater. Judgment for plaintiff, and defendant brings error. Modified and affirmed.

Murray Seasongood, of Cincinnati, Ohio, and Smith W. Bennett and J. G. Westwater, both of Columbus, Ohio, for plaintiff in error.

L. F. Sater and Vorys, Sater, Seymour & Pease, all of Columbus, Ohio, for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. This was an action to recover upon a judgment rendered by the District Court of the United States for the Western District of Pennsylvania in a suit commenced January 2, 1909, wherein Robert Lyons, as receiver of the Cosmopolitan National Bank of Pittsburg, Pa., was plaintiff, and James Westwater defendant. That suit was brought upon a promissory note executed in Pittsburg, June 15, 1908, payable to the order of H. R. Bean, for $37,500, at the Cosmopolitan National Bank, signed by James West-

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water and indorsed in blank by Bean. Among the defenses set up by Westwater was that the note was a renewal of another one made by him "as an accommodation note" for the bank. A directed verdict was entered in favor of defendant. Lyons v. Westwater (C. C.) 173 Fed. 111, 114. On writ of error the judgment was reversed, and the record remanded, with instructions to award a venire de novo. Lyons v. Westwater, 181 Fed. 684, 104 C. C. A. 663 (C. C. A. 3). The second trial resulted in a verdict and judgment in favor of the receiver for $43,425. This judgment was also reversed with a venire de novo. Westwater v. Lyons, 193 Fed. 817, 818, 824, 113 C. C. A. 617 (C. C. A. 3). The issues and the facts developed on such hearings are sufficiently shown in the citations just made.

On June 20, 1912, shortly after the last-cited decision was rendered, an agreement under seal was executed in Pittsburg by the receiver of the bank and Westwater, in which Westwater agreed to pay the receiver $4,500 "in compromise and settlement" of the original suit, payable $1,500 on or before June 24, 1912, and $3,000 in four months from that date, with interest; the last payment being represented by a cognovit note likewise executed in Pittsburg on the same date, payable to the order of the receiver, and signed and sealed by Westwater. The agreement contained another provision to which allusion will be made later.

Meanwhile Charles C. Murray had been appointed and qualified as the successor of Lyons in the bank receivership, and, under an order of the court in which the original suit was pending, had been substituted as plaintiff in the place of Lyons; accordingly Murray signed this compromise agreement, and the cognovit note was made payable to his order. Westwater paid the $1,500, but failed to meet the note. Afterwards, on April 4, 1913, the receiver by his counsel gave written notice to Westwater, through the latter's counsel, that the plaintiff (the receiver in the original action) had presented a petition to the court praying for approval of the compromise agreement and for judgment against Westwater for the balance due under the agreement, $3,000, with interest from June 20, 1912, and also for an attorney's commission of ten per cent. and costs; that the court had thereupon granted a rule on Westwater, returnable April 18, 1913, to show cause why the prayer of the petition should not be granted and judgment entered against him. April 4th, service of this notice was accepted by Westwater's counsel; and on the 25th of the month action was taken on the rule so granted, the court finding that the rule had been "duly served upon counsel for" Westwater, "and no answer having been filed by" him "or cause shown why the prayer of said petition (for approval of the compromise agreement, etc., as stated) should not be granted, on motion of * * * attorney for plaintiff, the prayer of said petition is granted"; whereupon the court entered an order approving and ratifying the agreement and also rendering judgment in favor of the receiver and against Westwater for $3,467.20, which included accrued interest, $152, and an attorney's commission, $315.20. This is the judgment upon which the present action is based; and an authenticated transcript of the proceedings had in the court rendering the judgment is attached as an exhibit to the petition in the

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action below. On June 29, 1916, recovery was allowed below for the full amount of the judgment sued on, with interest; reversal is sought under the present writ of error.

[1, 2] 1. A general demurrer to the petition was interposed in the court below and overruled. Westwater thereupon filed an answer and cross-petition admitting in the first defense the appointment of a receiver of the Cosmopolitan National Bank and the bringing of the original action by the receiver in the federal court of Pennsylvania, but alleging that the judgment herein sued on was rendered by that court upon a cognovit note, and that no notice of the judgment was given to Westwater and no appearance made by him or by his counsel when the judgment was rendered; and still another defense was set up and also made the subject of the cross-petition. To this pleading the defendant in error filed a demurrer, which was sustained. Assignments of error are made to the rulings upon the two demurrers; and it is contended that these rulings present an important question: Whether the District Court of Pennsylvania had jurisdiction to enter the judgment sued on herein. While it does not appear that any such question was raised in the court below, we are disposed to consider the matter. It is of course a general rule that in an action to recover upon a judgment rendered by a court of another state, inquiry may be made into the jurisdiction of the court over the person of the defendant against whom the judgment was rendered; but such an inquiry involves all the usual tests for determining such jurisdiction. Chicago Life Ins. Co. v. Cherry, 244 U. S. 25, 29, 37 Sup. Ct. 492, 61 L. Ed. 966. Here Westwater was already a party to the suit in which the judgment was rendered. He had become a party to that suit upon service of summons accepted for him by the same attorney who accepted service of notice of the fact that in that suit a petition had been presented to the court praying for approval of the compromise agreement and for judgment on the note given by Westwater to carry out such compromise and settlement, as already stated; he had empowered any attorney and of course his own attorney to appear for him and to confess judgment against him on the note, and this seemingly was done to put an end to the suit which had been tried four times—twice in the court of first instance and twice in the Circuit Court of Appeals. It is said, however, that the ultimate action so taken was in violation of the compromise agreement. The agreement in substance gave to the receiver the right of election, in effect an option, to treat the compromise agreement as null and void and to forfeit the first payment made under it in case Westwater failed to meet both the payments called for, and then to prosecute the original suit to final judgment. True, in case both payments were made the receiver was required to apply to the court for ratification and approval of the agreement and, if approved, to have the case marked "Settled and discontinued," or, if not approved, to refund any money paid; but there was nothing in terms to prevent him from taking the course here complained of. Surely it was not to violate any provision of the agreement to apply for its ratification and approval upon Westwater's failure to pay the note for $3,000; and it was simply to surrender a privilege of the receiver when he chose to waive forfeiture of Westwater's payment of $1,500 and to rely on the enforcement of

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the unpaid note; in other words, instead of resuming the litigation upon the old note for $37,500, the receiver sought the court's approval of the compromise and settlement of the suit and the enforcement of Westwater's promise to pay the $3,000. Stated in still another way, the receiver had the right under the compromise agreement either to treat it as void or to enforce its performance; no other inference can fairly be drawn from the right of election vested in the receiver by the agreement. Further, it is not alleged or claimed that Westwater ever revoked the power he had given to his attorney, as well as any other attorney, to appear for him and confess judgment upon the note; and it is not perceived how Westwater can question the course in fact taken by the attorney any more than he could be heard to say that the attorney exceeded his power in accepting service of summons in the original suit. Still further, the court's approval of the compromise agreement and allowance of the judgment entered in pursuance of it would seem to have been a proper step in the original suit and, sanctioned as it seems to have been by Westwater's attorney in that suit, was a proceeding of which Westwater cannot rightfully complain. Eden v. Naish, 7 Ch. D. 781, 782, 786; Ward v. Wilson, 92 Tex. 22, 27, 45 S. W. 8; Smythe v. Smythe, 18 Q. B. D. 544, 546. The objection then to the jurisdiction of the District Court of Pennsylvania must fail.

[3] 2. Another objection is urged under one of the assignments of error concerning a matter which does not appear to have been presented in the court below, and as to which no exception was specifically reserved. It is contended that the provision made in the cognovit note for allowance of an attorney's fee is contrary to public policy and void. As respects the state of Ohio, this would be true if the note had been purely an Ohio contract (Miller v. Kyle, 85 Ohio St. 186, 192, 97 N. E. 372, and citations); but it will be recalled that the note was executed and made payable at Pittsburg, and so was exclusively a Pennsylvania contract. It is a settled rule of judicial decision in Pennsylvania that provision may be made in promissory notes for the payment of reasonable attorney's fees for services required for their collection (McAllister's Appeal, 59 Pa. 204, 206; Imler v. Imler, 94 Pa. 372, 375; Walter v. Dickson, 175 Pa. 204, 207, 34 Atl. 646); though such provisions are enforced only to the extent of allowing reasonable compensation (Scott v. Carl, 24 Pa. Super. Ct. 460, 461, and citations). A contract made in and intended to be performed in accordance with the law of another state will be enforced in Ohio, although it may contain a provision, say for payment of a rate of interest, that is opposed to the law of the state (Scott v. Perlee, 39 Ohio St. 63, 67, 48 Am. Rep. 421; Kilgore v. Dempsey, 25 Ohio St. 413, 18 Am. Rep. 306); the same rule has been applied in respect of a contract exempting a carrier from liability for its own negligence (Knowlton v. Erie Railway Co., 19 Ohio St. 260, 263, 2 Am. Rep. 395), and also as to the fellow-servant doctrine (Alexander v. Pa. Co., 48 Ohio St. 623, 636, 30 N. E. 69); the case of Grover & Baker Machine Co. v. Radcliffe, 137 U. S. 287, 11 Sup. Ct. 92, 34 L. Ed. 670, differs so far in its facts from those of the instant case as to be inapplicable here; and we see no reason why this provision for the attorney's fee should not be enforced in Ohio. Indeed, under the full faith

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and credit clause of the federal Constitution, the courts of Ohio would be bound to enforce such a judgment as the one sued on in the court below, in spite of the fact that the provision of the cognovit note for allowance of an attorney's fee is opposed to the declared policy of the state. Fauntleroy v. Lum, 210 U. S. 230, 236, 237, 28 Sup. Ct. 641, 52 L. Ed. 1039; Beal v. Carpenter, 235 Fed. 273, 278, 280, 148 C. C. A. 633 (C. C. A. 8).

[4] 3. The main contention urged in the court below in behalf of Westwater arose upon the receiver's demurrer to the answer and cross-petition. It was in substance alleged in the second defense that fraud was practiced on Westwater in obtaining the judgment sued on herein, in that on February 20, 1907, he gave a note "without consideration and purely for the accommodation" of the Cosmopolitan National Bank for $37,500; that thereafter the note was paid by one McKinnie, who was a director and vice president of the bank; that "thereafter without the authority, direction or consent" of Westwater "some person" to him unknown "forged his name to a number of said notes of like amount, made payable at different dates" to the bank, "the various dates of the execution thereof, and of the times of payment thereof were and are to this defendant unknown." It is further alleged in this defense that the original suit in the District Court of Pennsylvania was based on one of these alleged forged notes and which bore date June 15, 1908; that he (Westwater), believing that this note bore his genuine signature and that it was the note which he had previously executed without consideration and delivered to the bank, made the compromise agreement and gave the cognovit note, upon which the judgment sued on in the court below was based; and that at the time he made the settlement he did not know that "the note upon which said original action was based was a false and forged instrument," but that after the judgment sued on herein had been entered, and "having discovered the facts," he notified the receiver that the note sued on in the original action had been forged. This defense is made the basis of the cross-petition, and it is there sought to recover the $1,500 payment made under the compromise settlement and, in case of recovery upon the judgment sued on below, also a judgment equal in amount to the one herein sued on and as an equitable set-off thereto.

The learned trial judge distinctly found, and we think rightly, that Westwater was guilty of laches in setting up this defense. Nearly seven years elapsed between the execution of the note and the claim here made that it was a forgery. Many things happened in that period which were calculated to advise Westwater of the forgery, if there was one. He was sued on the note in the federal court of Pennsylvania on January 2, 1909. The petition in that suit set out what purports to be a complete copy of the note, including signature. Westwater caused an original and an amended answer to be filed in the cause, in each of which he in effect admitted the genuineness of the note. He testified at each of the trials in the court of first instance; and, although the docket entries and the pleadings in the original suit appear as an exhibit to the petition in the case below, yet neither this exhibit nor the reports of the decisions of the Circuit Court of Appeals disclose anything like a question or claim of forgery. The vital

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question of fact to be determined at the third trial of the case was, as Judge Gray stated, whether Westwater had "any knowledge of the facts in regard to the use to which his paper (the note in suit) was to be put, as would make him a participant in the deception undoubtedly practiced by the officers of the bank upon the Comptroller of the Currency. Westwater v. Lyons, 193 Fed. 823, 113 C. C. A. 617 (C. C. A. 3). The suit stood for trial upon this issue of fact for more than two months, when, on June 20, 1912, the compromise agreement and settlement was made. The case remained in this situation for nearly another year before proceedings were begun to enforce the settlement. It is difficult to conceive of conditions which more certainly than these would occasion unremitting search into the origin of a note that was giving so much trouble; indeed, it almost surpasses belief that both Westwater and his counsel should have suffered the suit to progress for years without discovering the forgery of Westwater's name on the only instrument upon which the suit was founded, if such forgery in truth existed; but while it is true we are considering the answer and cross-petition under the receiver's demurrer, yet we are convinced that the instrument contains no allegations tending to excuse the obvious negligence of Westwater in discovering the alleged forgery. Brown v. County of Buena Vista, 95 U. S. 157, 159, 24 L. Ed. 422; Case of Broderick's Will, 21 Wall. (88 U. S.) 503, 512, 22 L. Ed. 599.

[5] Furthermore, it is to be remembered that the charge of forgery of the note in issue in the original suit is in effect aimed, not only against the cognovit note that was given in settlement of that suit, but also against the judgment rendered upon the cognovit note. We have already overruled the objection made to the jurisdiction of the court rendering that judgment. The charge of forgery then, as well as of fraud in obtaining the judgment, must be tested by the same rules that would be applicable to any properly entered judgment. It is not pretended that Westwater has taken any steps to obtain direct relief in the District Court of Pennsylvania, and, in view of the laches with which he is chargeable as before stated, the judgment must under long-settled rules be regarded as conclusive of the issues here sought to be raised. Thus in Cromwell v. County of Sac, 94 U. S. 351, 352, 24 L. Ed. 195, when speaking of the effect of a judgment, Mr. Justice Field said:

"A judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defenses were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defenses never existed."

And again, in United States v. Throckmorton, 98 U. S. 61, 68, 25 L. Ed. 93, Mr. Justice Miller, adopting language of Chief Justice Shaw in a case there cited, said:

"The maxim that fraud vitiates every proceeding must be taken, like other general maxims, to apply to cases where proof of fraud is admissible. But where the same matter has been actually tried, or so in issue that it might

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have been tried, it is not again admissible; the party is estopped to set up such fraud, because the judgment is the highest evidence, and cannot be contradicted."

See, to same effect, Covington & Cincinnati Bridge Co. v. Sargent, 27 Ohio St. 233, 238; Board of Com'rs v. Platt, 79 Fed. 567, 571, 25 C. C. A. 87 (C. C. A. 8); Rauwolf v. Glass, 184 Pa. 237, 241, 39 Atl. 79; Long v. Bank, 211 Pa. 165, 168, 60 Atl. 556.

[6] It is to be added that so far as the charge of fraud in obtaining the judgment sued on is concerned, there is no allegation that the receiver, the plaintiff in the original suit, had the slightest knowledge of the charge of forgery here in question, or that he resorted to any deception or other act that was inconsistent with fair dealing; in short, this feature of the fraud complained of is lacking in specific statement of facts and so is not well pleaded in the sense that it falls within the admission of the demurrer. Wood v. Carpenter, 101 U. S. 135, 140, 25 L. Ed. 807; Hardt v. Heidweyer, 152 U. S. 547, 559, 14 Sup. Ct. 671, 38 L. Ed. 548.

[7] 4. After judgment of the court below was entered, Westwater moved to set it aside on the ground that on June 20, 1916, the receiver of the bank "publicly sold and set off" the judgment in suit here to one Kirschler, and that on June 23d the District Court in which the original suit was brought entered an order approving and confirming the sale and directing the receiver to assign and transfer the judgment to the purchaser; it is stated on information that the transfer was made on June 26th. The order of sale was made after the opinion of the court below was announced, though six days before the judgment was entered. The motion to set aside the judgment was denied, upon which error is assigned. It is insisted that the transfer operated to abate the suit. We cannot assent to this. Whatever might have been the precise stage of the suit at the time of the transfer, it could have been prosecuted to an end either in the name of the receiver or in that of the purchaser if substitution had been made. Section 11261, O. G. C.; Lowry v. Anderson, 57 Ohio St. 179, 48 N. E. 810; Dundee Mortgage & Trust Investment Co. v. Hughes (C. C.) 89 Fed. 182, 184, per Gilbert, Circuit Judge; Cloquet Lumber Co. v. Burns, 222 Fed. 857, 861, 862, 138 C. C. A. 283 (C. C. A. 8); Standard Bag & Paper Co. v. Cleveland, 25 Ohio Cir. Ct. 380, 386; Ill. Cent. R. Co. v. Turrill, 110 U. S. 301, 304, 4 Sup. Ct. 5, 28 L. Ed. 154. Since the judgment must be affirmed, we are disposed to remand the cause with direction to grant leave, before enforcement of the judgment, upon motion and proper showing of either the purchaser or Westwater to have substitution or other order entered which will fully protect the rights and interests of all parties concerned.

[8] 5. Error is assigned to a refusal of the court below to permit amendment to the answer and cross-petition by alleging that the note for $37,500 upon which the original suit was based has not been returned to Westwater. This at most was harmless error; but we think the matter was clearly within the discretion of the court.

The judgment is affirmed, subject to the modification above stated.

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(245 Fed. 435)

ROBBINS v. PENNSYLVANIA CO.

(Circuit Court of Appeals, Sixth Circuit. October 11, 1917.)

No. 2972.

1. MASTER AND SERVANT ⟹328—ACTIONS FOR SERVANT'S TORTS—PARTIES.
A joint action cannot be maintained against a master and servant for an injury and death occurring in Ohio, where the master's liability arises solely under the doctrine of respondeat superior.

2. APPEAL AND ERROR ⟹1039(9)—HARMLESS ERROR—COMPELLING ELECTION.
In an action for the death of a person struck by a railroad engine, any error in requiring plaintiff to elect between paragraphs alleging a failure to sound the whistle or bell, or to stop the engine after discovery of decedent's peril, and a paragraph alleging that defendant carelessly, and recklessly, willfully, and wantonly caused the locomotive to strike and kill decedent, was harmless, where plaintiff was practically allowed to introduce all testimony presented having any pertinency to the several charges of negligence, and no exceptions were reserved to the giving or refusal of instructions having any bearing on the excluded paragraph.

3. RAILROADS ⟹401(9)—INJURIES TO PERSONS ON TRACK—INSTRUCTIONS—LAST CLEAR CHANCE DOCTRINE.
In an action for the death of a person struck by a railroad engine as he was starting to cross a bridge customarily used by the public in connection with a footpath along the right of way, the evidence showed that the engineer and decedent were both familiar with the bridge and its surroundings and were acquaintances; that as the engine approached the bridge the engineer saw decedent turn his head and look toward the engine; that it was decedent's usual course to stop on a platform at the entrance to the bridge and wait until the engine passed; that the engineer thought he would do this, but instead he started to cross the bridge in front of the approaching engine when it was too late to stop the engine. There was no evidence that the engineer had any reason to anticipate decedent's sudden turn into the zone of danger, or that the injury could have been avoided; but it appeared that he did not sound the bell or whistle. *Held* that the refusal of instructions on the subject of last clear chance was not error, as the most that could be said of the evidence was that it was open to the jury to find that both the engineer and decedent were guilty of negligence directly concurring in bringing about the injury.

4. NEGLIGENCE ⟹83—CONTRIBUTORY NEGLIGENCE—"LAST CLEAR CHANCE" DOCTRINE.
The doctrine of "last clear chance" takes account of the acts and omissions of both the person injured and the defendant, and applies only where the defendant has either actual notice or is fairly chargeable with notice of the peril of the person injured, and negligently fails to avoid the injury, and the rule never applies where the concurrent neglect of both directly contributes to the injury.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Last Clear Chance.]

5. APPEAL AND ERROR ⟹1059—HARMLESS ERROR—EXCLUSION OF EVIDENCE.
In an action for the death of a person, struck by a railroad engine while crossing a bridge customarily used by the public in connection with a footpath along the right of way, the exclusion of evidence to show that the place of the accident was part of an ordinary highway was immaterial, where the evidence was undisputed that decedent was familiar with its dangers, and it appeared that no use had been made of the land as an ordinary highway, or street, for many years, and that no such use had ever been made of the railroad bridge, and the court ruled in effect

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that the rights and obligations of the parties were the same as though the footpath formed part of the highway.

6. RAILROADS ⚷356(3)—DUTIES AT PLACES CUSTOMARILY USED BY PUBLIC.
Where a footpath along and adjacent to railroad tracks and a board walk across a bridge, constituting a continuation of the footpath, had been customarily used for years by people residing or working in the vicinity, the rights and obligations of the railroad company and a person struck by an engine were no greater or less than they would have been, had the footpath formed part of a public highway.

7. RAILROADS ⚷370—INJURIES TO PERSONS ON TRACK—SIGNALS.
Under Gen. Code Ohio, § 12549, requiring the person in charge of a locomotive engine, when approaching a road crossing, to sound the whistle or ring the bell, there was no obligation to give such warning in approaching a railroad bridge across which was a board walk customarily used by persons residing and working in the vicinity.

8. RAILROADS ⚷381(4)—INJURIES TO PERSONS ON TRACK—CONTRIBUTORY NEGLIGENCE.
The failure to ring the bell or sound the whistle in approaching such bridge, even if required, did not relieve a person starting to cross the bridge from the necessity of taking ordinary precautions for his own safety.

9. APPEAL AND ERROR ⚷1052(8)—HARMLESS ERROR—ADMISSION OF EVIDENCE.
The admission of evidence as to the reason for omitting to sound the bell or whistle in approaching such bridge was harmless, where the evidence showed contributory negligence.

10. RAILROADS ⚷384—INJURIES TO PERSONS ON TRACK—MAINTAINING DANGEROUS PLACE.
Any negligence on the part of a railway company in maintaining a narrow board walk 72 feet long across a bridge customarily used by the public in connection with a footpath along the right of way gave no right to recover for the death of a person struck by an engine while on the board walk, where the danger was manifest and decedent understood the situation perfectly.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Ohio.

Action by Mary A. Robbins, administratrix of Henry H. Robbins, deceased, against the Pennsylvania Company and another. Judgment for defendant company, and plaintiff brings error. Affirmed.

Charles Koonce, Jr., and Guy T. Ohl, both of Youngstown, Ohio (McKain & Ohl, of Youngstown, Ohio, of counsel), for plaintiff in error.

Fred J. Heim, of Youngstown, Ohio (Arrel, Wilson, Harrington & De Ford, of Youngstown, Ohio, of counsel), for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. This was an action by an administratrix against the Pennsylvania Company to recover damages for alleged negligence in causing the death of Henry J. Robbins. By an amended petition the charge of negligence was made jointly against both the Pennsylvania Company and its engine driver, John Lang, who was in charge of the locomotive through which decedent received his injuries. Lang made separate answer, admitting that he was operating

⚷For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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the engine at the time of the injuries, but denying the negligence charged against him, and alleging distinct acts of negligence on the part of decedent. The company sought and obtained removal of the cause to the court below, on the grounds of diversity of citizenship, as between plaintiff and the company, and also separable controversy, and alleging further that the recovery originally claimed was for $2,500, that by the amended petition this sum was increased to $25,000, and that the plaintiff had fraudulently and improperly joined Lang, a citizen and resident of the state of Ohio, for the sole purpose of defeating jurisdiction of the United States court and so preventing removal. Motion to remand, supported by affidavit, was overruled. Separate answer was subsequently filed by the company, admitting that Lang was in its employ in the capacity of a locomotive engineer and in charge of the locomotive in question, and alleging, among other things, the exercise of due care towards decedent and acts of contributory negligence on his part at the time of the injury. The case was heard on evidence offered by both sides; at the close of plaintiff's evidence, and again after all the evidence had been received, the company moved that a verdict be directed in its favor, which in each instance was overruled; the cause was submitted to the jury upon an extended charge of the court, and verdict was rendered for the company. Motion for new trial was overruled. Five assignments are relied on under the writ of error.

[1] 1. It is claimed that the court erred in denying the motion to remand. It is enough to say of this that, if the company can be made liable under the issues and the facts presented, it is because of the relation of master and servant which existed between it and the engineer in charge of the locomotive. The injury and death occurred in Ohio; and, according to the rule of decision prevailing in the state, a joint action cannot be maintained against a master and servant where the master's liability arises solely under the doctrine of respondeat superior. French v. Construction Co., 76 Ohio St. 509, 81 N. E. 751, 12 L. R. A. (N. S.) 669. It may be well to point out one of the reasons expressed in the opinion (76 Ohio St. 518, 81 N. E. 752):

> "It is, and since the decision by this court of Clark v. Fry, 8 Ohio St. 358 [72 Am. Dec. 590], has been, the settled rule and law in this state that a joint action cannot be maintained against master and servant, in any case where the master's liability for the wrongful and negligent act of the servant arises solely and only from the legal relationship existing between them under the rule of respondeat superior, and not by reason, or because of, the master's personal participation in such wrongful or negligent act."

The rule thus existing in the state is controlling here. Ches. & Ohio Ry. v. Cockrell, 232 U. S. 146, 152, 153, 34 Sup. Ct. 278, 58 L. Ed. 544; Chi., R. I. & Pac. Ry. v. Dowell, 229 U. S. 102, 113, 33 Sup. Ct. 684, 57 L. Ed. 1090; Illinois Central R. R. Co. v. Sheegog, 215 U. S. 308, 318, 30 Sup. Ct. 101, 54 L. Ed. 208; Veariel v. United Engineering & Foundry Co. (D. C.) 197 Fed. 877, 878.

[2] 2. One of the assignments is that the court erred in compelling plaintiff "to elect upon which averment [of negligence] she would proceed to trial." During the opening statement of plaintiff's

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counsel a question arose between counsel and the trial judge as to paragraph 5 of the amended petition, in which it is alleged that the company and its engineer, Lang, "carelessly, recklessly, willfully, and wantonly" caused the locomotive "to strike, wound, and kill the said Henry J. Robbins." The trial judge thought this was inconsistent with the first four paragraphs of the amended petition, in which the acts of negligence charged in substance were failure to sound the locomotive whistle or bell or to stop the locomotive after discovery of decedent's peril and before the engine struck him; and so the court required plaintiff to elect whether she would proceed under the allegations of paragraph 5 or those of the preceding four paragraphs. We do not find it necessary to pass upon this ruling, for it was not prejudicial. Counsel for plaintiff said in contending against the court's view as to inconsistency between the degrees of negligence alleged:

"The same evidence will go in, of course, under any circumstances, and what inference is to be drawn from it the jury only can determine."

And it is plainly to be inferred from the record that all available testimony on the subject of alleged negligence, regardless of degree, was introduced through the engineer, Lang; he was called by both sides as a witness and exhaustively examined; indeed he was the only person claimed to have witnessed the accident; in short, despite the election, plaintiff was practically allowed to introduce all the testimony she presented which could have any pertinency to the several charges of negligence. Requests were made for special instructions to the jury upon the subjects of paragraphs 1, 2, 3, and 4, but not of paragraph 5. These special requests were refused, and of this we shall speak later. The general charge treats extensively of the subject of negligence, and while exception was reserved to denial of the requests mentioned, yet none was taken to the general charge on the subject of negligence which has any bearing upon paragraph 5. The question then of inconsistency between allegations of "negligence" and "wanton negligence" is not important here.

3. Coming now to the requests denied, they were three in number and designed to present a question claimed to arise under the first four paragraphs of the amended petition in substance above stated. The exception was reserved at the close of the general charge, counsel stating that his exception was aimed at the court's refusal "to charge the doctrine of the last clear chance." The trial judge, however, stated in substance that it had been his purpose to include the requests in the general charge and that he believed this had been done.

In order rightly to understand this feature of the case it will be necessary to make a further statement of facts disclosed by the record. The defendant company maintains a double-track railroad at the place of the accident, which tracks may for present purposes be said to lie in an east and west direction. The west-bound trains move on the northerly track and the east-bound trains on the southerly one, and the tracks are accordingly distinguished as west-bound and east-bound. The accident occurred on the west-bound track and upon a bridge owned and maintained by the company across Mosquito creek in the city of Niles, Ohio. A path extended for some considerable distance

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along and adjacent to the northerly side of the west-bound track and to the Mosquito creek bridge, and many people residing or working in the vicinity of the track and bridge had been accustomed for years to walk upon this path and across the bridge upon a board walk maintained between the north rail of the west-bound track and a solid metal railing forming the northerly side of the bridge. The distance between the north rail of the track and the path which lay east of the bridge was such as to afford entire safety to pedestrians during the passage of trains; but, except as to a platform presently to be described, the space between the metal railing of the bridge and the overhang of a locomotive was admittedly not sufficient to enable a person passing along the board walk to avoid collision with a locomotive crossing on the west-bound track. The platform mentioned was maintained at the easterly end of the bridge between north and south lines intercepted by the east end of the metal railing and the west end of the path leading to the bridge as stated. The dimensions of this platform were such as to furnish complete safety to foot passengers who would remain at or near its northerly end during the passage of trains along the west-bound track. Persons moving from the west end of the path leading to the platform and bridge were accustomed to pass southwestwardly over the platform and into the board walk extending across the bridge.

The decedent was struck by the locomotive just as he was entering, perhaps he had taken a step or two, upon the easterly end of the board walk next to the metal railing of the bridge. We have seen that the engineer, Lang, was the only person who saw the accident or testified on that subject. Concededly both the engineer and the decedent were familiar with the path, the platform, and the board walk before described. The engineer had been engaged in operating a locomotive for switching purposes in the vicinity, and was so engaged at the time of the injury. The decedent had lived and had been working in the neighborhood for many years; it was his custom to pass over this path and platform and board walk several times almost daily; and he and the engineer were acquaintances. The accident occurred on the morning of a clear day. As the engine approached the bridge and Robbins was walking west on the path leading to the platform and board walk, Lang says he saw Robbins turn "his head to the left, over his left shoulder, and as he turned his head that way I was able to look right at his face." This satisfied Lang that Robbins saw the engine coming, and, referring to Robbins' usual course in such instances, he said Robbins "would come up to the end of the bridge, and then he would stop and wait until I got past, a great many times." He thought Robbins would in this instance follow the same course; instead of doing so, Robbins turned southwardly toward the board walk, when, as Lang testified, it was too late to stop the engine or avoid the accident. Lang said that he had Robbins in view from the time he became satisfied that Robbins knew the engine was approaching, and that immediately upon observing Robbins turn toward the board walk he employed all the means, such as reversing the engine, and did all within his power to avoid the accident. True, Lang did not sound the bell or whistle, and there was also an east-bound train passing over the bridge at the time of the injury; but

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the testimony is undisputed that, unlike the course pursued at street crossings, it was not customary here to give the signals alluded to upon approaching the bridge, and that Robbins' sudden turn from a place of safety to one of danger prevented giving either of such signals, and, as already stated, that the engineer was satisfied that Robbins knew the engine was approaching; still further, Lang testified without dispute that Robbins did not look for the approaching engine after his turn toward the board walk, and that he (Lang) then "yelled at Mr. Robbins" twice. The trial judge stated the situation thus pointed out in considerable detail, instructing the jury under what circumstances recovery should be allowed or disallowed, and in the course of the charge stating:

"Under the circumstances developed by the testimony introduced on this trial with respect to the use made by the public of the bridge where the accident complained of occurred, I charge you, then, the kind and degree of care which the engineer, Lang, was obliged in law to exercise to avoid injury to Robbins, was precisely the same degree and kind of care as that which Robbins himself was obliged in law to exercise in order to avoid suffering injury to himself."

To this plaintiff's counsel reserved exception and presented an assignment; but they make no contention here in respect of either. The court also instructed the jury that if it should be satisfied by a preponderance of the evidence that—

"* * * Engineer Lang did not exercise such care as men of ordinary care and prudence would ordinarily have exercised, if placed in his position, under the circumstances and conditions surrounding him just before and at the time of this accident, then he was negligent and the defendant company was negligent, and if this negligence contributed directly to cause the accident to decedent, then the plaintiff in this action would be entitled to recover, unless Robbins himself at the time of the accident was negligent in failing to exercise ordinary care for his own safety under the circumstances in which he was placed."

[3, 4] Considering the foregoing instructions in connection with the rest of the charge, we are convinced that the merits of plaintiff's case were fully and fairly explained to the jury under clearly stated and pertinent rules of law. The most that can be said of the applicable evidence is that it was open to the jury to find that both the railroad company, through Lang, and Robbins himself, were negligent, and that their negligence directly concurred in bringing about the injury. It results that no error was committed in refusing plaintiff's requests on the subject of last clear chance. There is no evidence tending to show that Lang had any reason to anticipate Robbins' sudden turn into the zone of danger or that thereafter the injury could have been avoided. On the contrary, Robbins' previous conduct warranted the engineer in believing that, in view of the knowledge Robbins had already shown of the approaching locomotive, he would await its passage instead of making the fatal turn, or at least that he would again look for the locomotive's approach and regulate his movements accordingly (Illinois Central R. Co. v. Ackerman, 144 Fed. 959, 961, 962, 76 C. C. A. 13 [C. C. A. 8]; St. L. & S. F. R. Co. v. Summers, 173 Fed. 358, 360, 97 C. C. A. 328 [C. C. A. 8]); and the testimony is positive that Robbins' turn and movement into danger occurred too late to enable the engineer to avoid the injury. The vice, then, of the requests was that

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they would open the company to a charge of negligence, regardless of the showing of concurring negligence in the decedent. The doctrine of last clear chance takes account of the acts and omissions of both the person injured and the defendant, and applies only where the defendant has either actual notice or is fairly chargeable with notice of the peril of the person injured, and negligently fails to avoid the injury; but the rule never applies where the concurrent neglect of both directly contributes to the injury. Gilbert v. Erie R. Co., 97 Fed. 747, 752, 38 C. C. A. 408 (C. C. A. 6); Winters v. Balt. & O. R. Co., 177 Fed. 44, 49, 100 C. C. A. 462 (C. C. A. 6); Dickson v. Chattanooga Ry. & Light Co., 237 Fed. 352, 353, 150 C. C. A. 366, L. R. A. 1917C, 845 (C. C. A. 6); Chicago, M. & St. P. Ry. Co. v. Bennett, 181 Fed. 799, 801, 104 C. C. A. 309 (C. C. A. 8); Gilbert v. Burlington, C. R. & N. Ry. Co., 128 Fed. 529, 533, 63 C. C. A. 27 (C. C. A. 8); Atchison, T. & S. F. Ry. Co. v. Taylor, 196 Fed. 878, 880, 116 C. C. A. 440 (C. C. A. 8); Northern Pac. Ry. Co. v. Jones, 144 Fed. 47, 51, 75 C. C. A. 205 (C. C. A. 9); Drown v. Traction Co., 76 Ohio St. 234, 247, 81 N. E. 326, 10 L. R. A. (N. S.) 421, 118 Am. St. Rep. 844. And see Davies v. Mann, 10 M. & W. 545, 548, which is generally regarded as the "origin of the doctrine of 'last clear chance.'" 55 L. R. A. 418, note. The real trouble with plaintiff's case is the difficulty of explaining decedent's action on reaching the platform; no explanation of this is given which is consistent with any right of recovery. Whether decedent then knew or was chargeable with knowing that the locomotive was approaching, was clearly the ultimate question of fact. This question was made prominent in the evidence and in the general charge, and must be regarded as concluded by the verdict.

[5, 6] 4. The assignment of error concerning exclusion of evidence offered to show that the place of collision was part of an ordinary highway seems to us to be immaterial. The evidence was undisputed that the public had for years been permitted to pass along the footpath before described, and that the decedent was quite as familiar with the dangers attending such passage as the company was itself. Whether the footpath thus used was or was not part of a highway, it is certain that no use had been made of the land as an ordinary highway or street for many years, and that no such use had ever been made of the railroad bridge. However, in view of the long and continued use proved to have been made of the footpath, the rights and obligations of the parties were no greater or no less than they would have been had the footpath admittedly formed part of an ordinary public highway. Northern Pacific Ry. Co. v. Jones, 144 Fed. 47, 49, 75 C. C. A. 205, and citations (C. C. A. 9). And this in effect was the ruling below.

[7-9] 5. The last assignment relied on concerns the admission of testimony to the effect that the reason for omitting to sound the bell or whistle as a warning of the locomotive's approach was that the approach did not lead to a highway crossing. What is said in the last two paragraphs would seem sufficient to answer this objection. Further, however, the company was under no statutory duty to give this warning in approaching a bridge such as the one here involved. See section 12549, Ohio G. C. But even if the injury had occurred at a road crossing and

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the railroad's failure to give the warning were treated as negligence, this would not have relieved Robbins from the necessity of taking ordinary precautions for his own safety. Schofield v. Chicago & St. Paul Railway Co., 114 U. S. 615, 618, 5 Sup. Ct. 1125, 28 L. Ed. 224; Gilbert v. Erie R. Co., 97 Fed. 749, 38 C. C. A. 408 (C. C. A. 6); Chicago, M. & St. P. Ry. Co. v. Bennett, 181 Fed. at 802, 803, 104 C. C. A. 309 (C. C. A. 8). And certainly the duty of the railroad was not greater, nor that of Robbins less, because of the fact that the injury occurred at the entrance to the bridge. If, then, it be assumed that the testimony as to the reason for omitting to sound the bell or whistle was inadmissible, the error was harmless.

[10] Stress does not seem to be laid in the brief, as it was in oral argument, upon the claim that it was negligence in the railroad company simply to maintain this very narrow board walk—it is 72 feet long—for foot travel over the bridge; but, since the danger is manifest, it is plain that relief cannot be obtained in a case such as this, and especially as respects one who, like decedent, understood the situation perfectly.

The judgment is affirmed.

(245 Fed. 442)

CLARK v. JOHNSON et al.

In re OZARK LAND & LUMBER CO.

(Circuit Court of Appeals, Eighth Circuit. July 25, 1917.)

No. 4838.

1. BANKRUPTCY ⟹52—COURTS OF BANKRUPTCY—EQUITABLE NATURE OF PROCEEDINGS.

   Bankruptcy proceedings are in the nature of proceedings in equity, and bankruptcy courts administer the law according to the spirit of equity.

2. CORPORATIONS ⟹243(1)—STOCKHOLDERS—LIABILITY OF INNOCENT PURCHASERS OF UNPAID STOCK.

   Bankrupt, an Arkansas corporation, issued stock, which was delivered to the purchaser of its bonds, without other consideration. All of the stock was placed for 10 years in the hands of voting trustees, who issued certificates which recited that the holder at the end of 10 years was entitled to full-paid stock to the face value, and prior to that time to any dividends declared on the certificate. Claimants purchased certain of the bonds in the open market in New York, and received with them a proportionate amount in the voting trust certificates; they had no knowledge of the stock, nor the manner of its issuance. *Held* that, as bona fide purchasers of the bonds with the certificates, they did not become liable as subscribers for unpaid stock to assessment for the benefit of creditors of the bankrupt.

Appeal from the District Court of the United States for the Western District of Arkansas; F. A. Youmans, Judge.

In the matter of the Ozark Land & Lumber Company, bankrupt. From an order allowing the claims of James D. Johnson and others, bondholders, Perry N. Clark, trustee, appeals. Affirmed.

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F. M. Etheridge, of Dallas, Tex. (W. N. Ivie and Duty & Duty, all of Rogers, Ark., and Etheridge, McCormick & Bromberg, of Dallas, Tex., on the brief), for appellant.

Henry L. Fitzhugh, of Ft. Smith, Ark. (Joseph M. Hill and John Brizzolara, both of Ft. Smith, Ark., on the brief), for appellees.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

CARLAND, Circuit Judge. This is an appeal from an order of the District Court allowing claims of appellees against the estate of the Ozark Land & Lumber Company, a bankrupt. The facts which condition the validity of the claims are as follows:

The Ozark Land & Lumber Company was incorporated under the general law of the state of Arkansas, November 26, 1910, with a capitalization of $150,000, divided into 6,000 shares, of the par value of $25 each. It was represented in the articles of incorporation that the following named persons had subscribed for shares of stock in said corporation as follows: George D. Locke, 4,000 shares; J. W. Walker, 200 shares; J. S. McCleod, 200 shares; R. C. Hobbs, 1,400 shares; and W. W. Moody, 200 shares. None of these subscribers ever paid anything on his stock subscription. The certificate of incorporation recited that the stock "is to be paid by installments, in such proportion and at such time as the directors shall think proper."

On November 29, 1910, W. R. Felker sold to the corporation 12,152.37 acres of land in the counties of Benton, Madison, and Washington, Ark., for $150,000 and 5,950 shares of its capital stock. As payment therefor the corporation gave Felker six notes, for $25,000 each, and secured the payment of the same by a mortgage on the land, and thereafter, on May 18, 1912, issued certificates of stock to Felker, amounting to 5,950 shares. The other 50 shares were disposed of by donating 10 shares to five individuals to qualify them as directors. In the latter part of 1911, or the early part of 1912, Felker and George D. Locke, president of the corporation, entered into negotiations with Smith & Potter, dealers in investment securities in New York City, which resulted in an agreement that the corporation should increase its capital stock from $150,000 to $300,000; that it should issue 150 bonds, of $1,000 each, secured by a first deed of trust to the Mississippi Valley Trust Company of St. Louis, Mo., upon all of the land purchased by the corporation from Felker; that Smith & Potter should buy the bonds at 90 cents on the dollar for those delivered by the Trust Company prior to March 1, 1912, and 90 cents with accrued interest for those delivered subsequent to said date; that the corporation should donate to Smith & Potter the increased capital stock of $150,000, and in addition thereto Felker should donate to them 50 shares of the original issue of stock, the proceeds arising from the sale of the bonds to be received and accepted by Felker in discharge of the notes given for the purchase price of the land.

This agreement was carried out. The corporation amended its charter, increasing its capital stock from $150,000 to $300,000. The stockholders and directors voted the increase, and resolved that for

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the purpose of facilitating the sale of the bonds the $150,000 increased capital stock be distributed among the subscribers and purchasers of said bonds as they were paid for, allotting to each subscriber 40 shares of stock, of the par value of $25 each, to each bond, which were of the denomination of $1,000 each. At the stockholders' meeting Felker voted 5,950 shares and the other five stockholders 10 shares each.

On January 25, 1912, a deed of trust to the Trust Company, as trustee, was executed, and the 150 bonds were issued, but dated January 2, 1912. They were deposited with the Trust Company, which upon the order of George D. Locke, president of the corporation, transmitted them to the Standard Trust Company of New York, to be delivered to Smith & Potter upon payment by them therefor. Smith & Potter paid for the bonds at various dates between February 6 and July 2, 1912. The proceeds of the bonds were appropriated by Felker, in consideration of which he canceled the six $25,000 notes and his mortgage to secure the same. The bonus stock was not issued at the time of the execution of the bonds or the deed of trust to secure the same; it being agreed apparently that the bonus stock was not to be issued until the bonds were paid for. The bonus stock was issued in May, 1912, to Smith & Potter. Prior to the issuance of the bonus stock to Smith & Potter, the stockholders of the corporation, including Smith & Potter, entered into a "voting trust agreement," dated May 1, 1912. By virtue of this trust agreement the stockholders placed their stock irrevocably for a period of 10 years in the hands of voting trustees.

It was further provided in the trust agreement that the stock held by any stockholder who should become a party to the trust agreement should be deposited with the Trust Company hereinbefore mentioned, and that the stockholders should receive in exchange therefor voting trust certificates to be signed by the voting trustees and the Trust Company; that all shares of stock should be transferred upon the books of the corporation to the voting trustees. Pursuant to this agreement Smith & Potter with other stockholders transferred the stock held by them to the voting trustees and received therefor voting trust certificates corresponding with the amount of stock transferred.

It is claimed that the transfer of stock was made by canceling the original certificates of stock and issuing new certificates direct to the voting trustees. The voting trust certificates recited on their face that on the 1st day of May, 1922, the holder of any certificate would be entitled to receive a certificate or certificates of stock for the number of shares of fully paid stock in the corporation called for by the trust certificate or the proceeds thereof if the same had been sold as provided in the voting trust agreement dated May 1, 1912, and that in the meantime each holder should receive payment equal to the dividends, if any, declared by the voting trustees upon a like number of shares standing in their names, and that until the actual delivery or sale of such certificates of stock the voting trustees should possess and should be entitled to exercise all rights of every name and nature, including

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the right to vote thereon in respect to all such stock. The voting trust certificate provided that it should be transferable by the registered holder thereof, either in person or by an attorney upon surrender thereof at the office of the Trust Company only on the books of the voting trustees and in accordance with the rules and regulations established for that purpose, and that until so surrendered the voting trustees might treat the registered holder thereof for all purposes as the owner of all right, title, and interest of every character therein. Between February 6, 1912, and July 2, 1912, Smith & Potter sold the bonds purchased by them and a portion of the trust certificates representing shares of increased stock to appellees in the following amounts:

Purchasers.	No. Bonds.	Par Value.	V. T. Cert.	Par Value.
D. L. Whitmore	40	$40,000	800	$20,000
J. H. Birch	40	40,000	1,068	26,700
H. G. McFaddin	10	10,000	300	7,500
G. W. Carroll	10	10,000	200	5,000
F. C. Foster	10	10,000	200	5,000
James D. Johnson	15	15,000	300	7,500
John L. Bassett	7	7,000	140	3,500
John H. Folk	7	7,000	280	7,000
Sidney Thursdy	3	3,000	60	1,500
R. A. Powers	2	2,000	100	2,500
W. G. French	6	6,000	160	4,000
	150	$150,000	3,608	$90,200

The evidence for appellees is to the effect that the bonds and voting trust certificates were purchased by them as one transaction, and that the money paid by them was for the joint purchase of the bonds and voting trust certificates. It appears, however, that Smith & Potter, although they were entitled to the stock by agreement, did not receive the same until some time in May, 1912, and did not receive all of the voting trust certificates until some time in July, 1912. This, however, would not show that the trust certificates were not in fact purchased at the same time as the bonds, as the trust certificates could have been sold to be delivered when Smith & Potter should receive them. The amount which each appellee paid for his bonds and trust certificates does not appear, but it is safe to presume that they paid more than Smith & Potter. Johnson and Powers, two of the bondholders, testified that they purchased the bonds held by them and the voting trust certificates on the open market in New York City, without knowledge that the stock represented by the voting trust certificates had not been paid for; that at the time of purchase nothing was said about this matter one way or the other. Frank A. Potter, of the firm of Smith & Potter, testified that he had heard the testimony of Johnson and Powers, and that all the bonds and stock in controversy were sold in the same manner. The referee found also that the corporation sold the bonds to Smith & Potter.

Appellees' claims are based upon the above-mentioned bonds. The referee in bankruptcy, on objection of the trustee, decided that the allowance of the amount due upon the bonds should be stayed until it might be determined what assessment was due from appellees to

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the creditors of the bankrupt on the stock held by them; the appellees being regarded by the referee as subscribers to the capital stock of the corporation in the amount of the trust certificates, whose subscriptions had not been paid, thereby invoking the doctrine that unpaid stock subscriptions pass to the trustee in bankruptcy and that the stock of an insolvent corporation is a trust fund for the benefit of the creditors of the corporation. The record shows that the indebtedness of the corporation is in round numbers $311,000 and the appraised value of its assets $212,000.

On petition for review the District Court reversed the order of the referee, and decided that, if appellees could be considered as subscribers for the capital stock of the corporation under the circumstances, nevertheless, under the Constitution of Arkansas, the stock was null and void and conferred no rights or imposed liabilities. From this decision the trustee appealed.

The claim of counsel for appellant may be stated in this way: Appellees purchased the voting trust certificates, or received them as a bonus, with knowledge that the stock represented thereby had not been paid for, or with knowledge of facts which, if investigated, would have led to such knowledge; that under such circumstances the law would imply a contract on the part of appellees to pay for the stock represented by the voting trust certificates; and that, therefore, appellees are liable to be assessed in such an amount upon their stock that, when added to the total assets of the corporation in the hands of the trustee, would pay the creditors of the corporation in full.

Counsel for appellees claim that their clients purchased the voting trust certificates in the open market under such circumstances as would constitute them bona fide purchasers of the same from Smith & Potter, to whom they had been issued by the voting trustees, and therefore they are not subscribers for unpaid stock and not liable to any assessment in behalf of the creditors of the corporation. They also maintain, and this view seems to have been adopted by the trial court, that by virtue of section 8 of article 12 of the Constitution of Arkansas the shares of stock represented by the voting trust certificates were null and void, and therefore no rights or liabilities can arise thereon. The section of the Constitution above referred to reads as follows:

> "No private corporation shall issue stocks or bonds, except for money or property actually received or labor done, and all fictitious increase of stock shall be void."

The increase of the capital stock of the corporation seems to have been regularly made under the laws of Arkansas. The corporation had power to increase its stock as it did, and, if it is null and void, it must be by virtue of the section of the Constitution above quoted. Section 8 has not been construed, so far as we are advised, with reference to the conditions existing in the present case, by the Supreme Court of Arkansas; but the Supreme Court of the United States in Memphis & Little Rock Ry. Co. v. Dow, 120 U. S. 287, 7 Sup. Ct. 482, 30 L. Ed. 595, used the following language in reference thereto:

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"Recurring to the language employed in the Arkansas Constitution, we are of opinion that it does not necessarily indicate a purpose to make the validity of every issue of stock or bonds by a private corporation depend upon the inquiry whether the money, property, or labor actually received therefor was of equal value in the market with the stock or bonds so issued. It is not clear, from the words used, that the framers of that instrument intended to restrict private corporations—at least, when acting with the approval of their stockholders—in the exchange of their stock or bonds for money, property, or labor, upon such terms as they deem proper, provided, always, the transaction is a real one, based upon a present consideration, and having reference to legitimate corporate purposes, and is not a mere device to evade the law and accomplish that which is forbidden."

[1] In view of the above language and the case of Handley v. Stutz, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227, we are not prepared, nor do we find it necessary, to decide that the increased stock was fictitious within the meaning of the Constitution. We prefer to place our judgment upon the proposition that appellees are not, and never have been, subscribers to the capital stock of the corporation. Bankruptcy proceedings are in the nature of proceedings in equity, and bankruptcy courts administer the law according to the spirit of equity. Bardes v. Hawarden Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175; Lockman v. Land, 132 Fed. 1, 65 C. C. A. 621; In re Broadway Savings Trust Co., 152 Fed. 152, 81 C. C. A. 58; Ogden v. Gilt Edge Mining Co. (8th Cir.) 225 Fed. 723, 140 C. C. A. 597.

Although we are obliged to deal in this case with the legal corporate entity called the Ozark Land & Lumber Company, still, when we look through the legal form of this entity, we can see no one but Felker. The money of appellees paid the notes of Felker to the amount of $150,000, and now it is proposed by the trustee in bankruptcy to compel them to pay to the estate of Felker in round numbers $90,000 more, in order that they may receive back from said estate the money which they advanced to pay said notes. Fair dealing would require, in our opinion, a very strong case to accomplish such a result, especially when the assessment to be levied would be used to pay indebtedness incurred by Felker before the issuance of the increased stock. Let us now see what the transaction was between appellees and Smith & Potter.

[2] Appellees did not purchase shares of stock. They purchased in the open market at the city of New York, in connection with the purchase of their bonds, certain voting trust certificates, issued by voting trustees and the Trust Company, wherein it was recited that in 10 years the holder of the voting trust certificate would be entitled to receive fully paid up shares in the corporation to the amount represented by the trust certificate; that in the meantime the holder of the trust certificate should be entitled to receive payments equal to the dividends, if any, collected by the voting trustees. The names of appellees never appeared upon the books of the corporation as stockholders, and the corporation never treated them as stockholders. What is a purchaser in New York City to rely upon, if he cannot rely upon the statements of the trust certificate? We do not think appel-

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lees, or either of them, were compelled in order to be bona fide purchasers to travel to the state of Arkansas for the purpose of investigating the affairs of the corporation. The truth is they never intended to become subscribers for stock of the corporation.

It is urged that, when Smith & Potter transferred their stock to the voting trustees, the old stock was canceled and new stock was issued directly to the trustees, and that by virtue of the trust agreement the voting trustees were constituted the agents of the stockholders, and therefore appellees, when they purchased the trust certificates, stood in the same relation to the corporation as Smith & Potter; but, when the stock was issued to the voting trustees, the latter were the agents of Smith & Potter, not of appellees. It is not shown that appellees knew anything about how the stock was handled by Smith & Potter. We are clearly of the opinion that, so far as the record before us is concerned, appellees had a right to rely upon the statement in the voting trust certificate that the stock represented by the certificate was fully paid. The further statement that the holder of the voting trust certificate would be entitled to dividends during the 10 years was entirely contrary to the idea that it was unpaid stock. We find the law upon the subject under discussion stated in Cook on Corporations (7th Ed.) vol. 1, § 50, as follows:

"A bona fide purchaser for value and without notice of stock issued by a corporation as paid up cannot be held liable on such stock in any way, either to the corporation, corporate creditors, or other persons, even though the stock was not actually paid up as represented. Such a purchaser has a right to rely on the representations of the corporation that the stock is paid up. * * * Where, however, a statement is made on the face of the certificate that it is paid-up stock, the bona fide purchaser of the certificate need not inquire further, but may rely on that representation, and is protected thereby against liability. * * * The law goes still further, and holds that where a person in open market, in good faith and without notice, purchases certificates, such stock is to be deemed 'paid up' in his hands, and he is protected as a bona fide purchaser, even though there is nothing on the face of the certificates stating that they are paid up. This can now be laid down as the established rule. It is based on sound public policy, favoring, as it does, the transfer of personal property, and the quasi negotiability of stock, and discountenancing secret liens and constructive notice. A purchaser in open market of stock represented to be paid up by a statement to that effect on the certificate is presumed to be a bona fide purchaser. Hence there has arisen the well-established rule, both in America and England, that a bona fide purchaser for value, and without notice, of stock issued as paid up, is not liable for any part of the par value which may not have been paid. In a case where parties receiving stock and bonds from the corporation in payment for property sold the bonds with a bonus of stock, the Supreme Court of the United States held that the purchasers were not necessarily purchasers with notice."

Many authorities are cited in support of the above statement of the law. Thompson, Commentaries on the Law of Corporations, vol. 3, §§ 2934, 3223, states the law in the same way. See, also, section 177, Helliwell on Stockholders; Morawetz on Corporations, § 161; and Clark & Marshall on Private Corporations, 1741.

Counsel for appellant suggest that all this law may be eliminated by quoting the following lines from section 2934, vol. 3, Thompson on Corporations:

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"But all these decisions assume that the stockholder sought to be charged purchased the shares after they had been issued and put on the market as paid-up shares. They have no application to the case of an original subscriber."

We may suggest that these lines may be eliminated by treating appellees as purchasers of stock, and not as original subscribers, which in our judgment the record clearly shows.

In our opinion, law and justice require the affirmance of the judgment below; and it is so ordered.

(245 Fed. 449)

BADER GOLD MINING CO. v. ORO ELECTRIC CORP.

(Circuit Court of Appeals, Ninth Circuit. August 6, 1917.)

No. 2966.

1. WATERS AND WATER COURSES ⟹144—NATURAL WATER COURSES—OWNERSHIP IN WATER.
   There is no ownership in water flowing in a natural stream before it is diverted into a ditch, or at least restrained for such diversion by a dam or otherwise.
2. WATERS AND WATER COURSES ⟹144—DIVERSION BY DITCH—OWNERSHIP OF WATER DIVERTED.
   That a complainant, by diverting water from a stream through a ditch, deprived defendant of water which it had a prior right to take from the stream at a point lower down, does not constitute a defense to a suit to enjoin trespass by defendant by opening the ditch and taking water therefrom without permission, or paying therefor.
3. WATERS AND WATER COURSES ⟹144—EASEMENT FOR DITCH—RIGHTS OF SERVIENT OWNER.
   That the owner of a ditch having an easement to cross defendant's land was diverting into such ditch more water than it had the right to carry therein gave defendant no right as servient owner of the land to tap the ditch and withdraw the excess therefrom for its own use.

Appeal from the District Court of the United States for the Second Division of the Northern District of California; Wm. C. Van Fleet, Judge.

Suit in equity by the Oro Electric Corporation against the Bader Gold Mining Company. Decree for complainant, and defendant appeals. Affirmed.

R. H. Cross and Arthur H. Brandt, both of San Francisco, Cal., for appellant.

Charles P. Eells, Hugh Goodfellow, Stanley Moore, and W. H. Orrick, all of San Francisco, Cal., for appellee.

Before GILBERT and HUNT, Circuit Judges, and DOOLING, District Judge.

DOOLING, District Judge. Oro Electric Company, plaintiff herein, is the owner of a certain ditch in Butte county, known as the "Nickerson Ditch." This ditch crosses the land of defendant, Bader Gold Mining Company, some distance below its intake which is on

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Little Butte creek, whence it derives the water which it carries. The water is used for irrigation and for the generation of electricity which is distributed to customers in Oroville and elsewhere. Plaintiff's bill avers its ownership and possession of the ditch, and complains that defendant asserts some claim to a portion thereof, and claims the right to enter thereon and take water therefrom without making compensation therefor, and has repeatedly and without right, and against plaintiff's command forcibly entered upon and opened the ditch, and injured the banks thereof, and taken the water therefrom without making or tendering any compensation therefor. The bill further avers that such claims are without right or foundation, but that defendant threatens to continue to assert them, and to continue to enter upon and interfere with the ditch and take water therefrom without compensation, and will continue to do so unless restrained by the court. The bill then avers the diverse citizenship of the parties, and that the matter in dispute, exclusive of interest and costs, exceeds the sum of $3,000, and prays a decree that the claims of defendant are without right; that it has no estate, right, title, or interest in or to the ditch, and no right to take water therefrom; and that it be enjoined from asserting such claim or interfering with the ditch or taking water therefrom.

That plaintiff has an easement right for the carriage of water through the Nickerson ditch across the lands of defendant is not denied, nor is its ownership of the ditch seriously questioned; but defendant does deny that such ownership confers the right to carry a greater amount of water than was carried by the ditch prior to 1906, at which time defendant claims the ditch was enlarged by plaintiff without right to do so.

The answer admits that defendant asserts a claim to a portion of the ditch, and has taken water therefrom, and will continue to do so. As a second defense the answer avers that, when the Nickerson ditch was enlarged in 1906, plaintiff's predecessors in interest took, by means of the enlarged ditch, from Little Butte creek 500 inches of water, which defendant had theretofore appropriated at a point some 2 miles below the intake of the Nickerson ditch, thus depriving defendant of the use of said 500 inches of water owned by it, and that immediately thereupon the defendant recaptured said water as it flowed through the Nickerson ditch, by opening a gateway therein and letting run therefrom water only sufficient for its use, not to exceed 500 inches; this being, according to defendant's contention, the trespass complained of.

The answer as a third defense alleges that plaintiff is in possession of the Nickerson ditch and is the owner of an easement to maintain the same across the lands of defendant and adjoining property owners, but owns no land across which the ditch runs, and that defendant has at no time used the ditch for a purpose inconsistent with the enjoyment of the easement possessed by plaintiff. For a fourth defense the answer avers that plaintiff's cause of action is barred by certain California Code provisions. A fifth defense avers that plaintiff has been guilty of laches in not bringing its action within a reasonable time. A sixth defense asserts defendant's right to use the

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Nickerson ditch to carry the 500 inches of water, and its right to take the water therefrom; such rights having been acquired by adverse use.

A further and separate answer by way of counterclaim asserts defendant's right by prescription to use the Nickerson ditch for the carriage of water from its intake to the point where it has been taking water therefrom, avers that plaintiff claims some interest adverse to such right, and prays that defendant's asserted right be declared valid, and that plaintiff be enjoined from making any claim upon such use of the ditch by defendant.

From a decree awarding plaintiff the relief prayed for, the defendant appeals.

The trial court finds against defendant upon its general denials, and upon its fourth, fifth, and sixth defenses, and upon the separate answer and counterclaim. These findings, although vigorously assailed by defendant, are amply supported by competent evidence, and on well-settled principles cannot be disturbed. The court, however, deeming them immaterial, made no findings on the matters set up in the second and third defenses, which may be briefly characterized as the defense of recapture of water, and the defense of the use of the ditch by defendant for a purpose not inconsistent with the enjoyment of the easement possessed by plaintiff.

[1, 2] The theory of the first of these defenses is that defendant may justify the tapping of plaintiff's ditch and the taking of water therefrom by showing that it is entitled to have certain of the water carried therein flow down Little Butte creek to the point two miles below, where by appropriation it was entitled to divert it by means of another ditch belonging to itself. In other words, the contention is that, because plaintiff has diverted water which defendant would be entitled to divert if and when it reached a point on Little Butte creek two miles below, it may remedy the injury suffered by it from such diversion on the part of plaintiff, by a continued trespass upon plaintiff's ditch; such remedy being analogous to the common-law remedy of reception of personal property. To extend the right of reception, so as to make it embrace water running in the ditch of another, is to lose sight of the nature of the remedy and the character of the property to which it is applicable. In the first place to be subject to reception the property must be the property of the "recaptor," and must also be the identical property taken by another, capable of identification, and not other property however similar. But one has no ownership of water flowing in a natural water course before it is diverted into his ditch, or at least restrained for such diversion by his dam or other diverting means. Parks Co. v. Hoyt, 57 Cal. 46; Duckworth v. Watsonville Co., 150 Cal. 520, 89 Pac. 338.

In the second place the reception must be such a retaking as transfers the possession at once to the owner, and not a continued action extending over months, and perhaps years, and inviting at every moment a conflict. It must be borne in mind that it is not sought by the present action to recover the water already "recaptured" and reduced to possession by defendant in the past, but to prevent the constant and continued "recapture" which is threatened in the future.

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If such an extension of the doctrine of recaption were sanctioned by the courts, it would be an invitation to every individual, who claims that water belonging to him has been taken by another, to invade the other's ditch, for it is not a court remedy for which defendant is contending, but what counsel styles "a self-remedy immediately available." Nor is it material here that plaintiff's ditch crosses defendant's land, because recaption, if available at all, is available wherever the property may be found, so it be not accompanied by a breach of the peace, or by undue force. And indeed it does not appear by any averment in either the complaint or the answer that the trespass complained of here occurred on that portion of plaintiff's ditch which is upon the defendant's land. Furthermore, if defendant's claim of right to recapture were sound, it must follow, as contended for in the defense under consideration, that defendant would be entitled to enforce it in the courts; that is to say it would have the right to come into court and secure a decree compelling plaintiff to deliver to it, at a point on plaintiff's ditch to be selected by itself, the water which it would have been entitled to divert, had such water reached its own point of diversion in the original watercourse. In this way it would, of course, secure, not only the water to which it laid claim, but also the use of plaintiff's ditch for whatever distance it desired the water to be carried therein. Such a doctrine, applied to appropriated water, which never becomes the property of any appropriator until reduced to possession in his own ditch, was repudiated by the Supreme Court of California in the case of Silver Creek & Panoche Land Co. v. Hayes, 113 Cal. 142, 45 Pac. 191. The plaintiffs in that case owned a canal and sued defendant alleging that they were in possession of the canal, and that defendant without their permission had entered upon the same and taken water therefrom. The water from the canal came from Panoche creek. In a cross-complaint the defendant averred that he owned a large tract of land which it was necessary to irrigate, and that the only waters available were the waters of Panoche creek. It was further averred that the rights of defendant were superior to the rights of plaintiffs therein. The case in all essentials seems to be parallel with the present one. In holding that the facts stated would not justify the acts complained of by plaintiffs, the Supreme Court said:

"If the cross-complaint can be held to state a cause of action which might be the basis of an independent suit, it does not state a cause of action which is the proper subject of cross-complaint in this case. * * * No right of water is asserted, nor was it necessary for plaintiffs in order to make a case to show any. The court so held in giving them the relief demanded, while finding that they had no right to the water in the creek. The trespass charged did not consist in destroying or injuring the dam or other means by which the water was diverted from the creek, nor in diverting the water in the creek to other uses, but was an injury to the embankments of the ditch, and a taking of the water from the ditch itself. Had the alleged trespass consisted in an attempt to prevent the flow into the ditch from the stream possibly the assertion of a right to have the water flow would be considered, but no such defense could be made here. The cause of action set up by plaintiffs and the rights asserted by defendant have no reference to each other. True, there was water in the ditch, and the evidence shows that it came from Panoche creek. But the fact that defendant had a superior right

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to the water flowing in the creek would not justify him in destroying the ditch, or in taking what water he needed from the ditch at points were it passed over or near his land."

Defendant urges that the portion of the decision above quoted is mere dictum and entitled to little consideration. But such is not the case. It was one of the reasons upon which the court based its judgment, is no more to be rejected than any other one, and in any event is a clear and correct statement of the law. However vigorously urged and skillfully presented, the defense of "recapture" is unsound, and was properly rejected by the trial court.

[3] Equally unsound, as attempted to be applied here, is the third defense; that is to say, the defense of a use of the ditch by defendant not inconsistent with the easement right of plaintiff across its land. What is sought by this defense is to compel plaintiff, before it can prevent defendant from tapping its ditch and taking water therefrom, to establish definitely the quantity of water which it has an easement to carry in its ditch across the defendant's land, on the theory that all in excess of that quantity may be taken from the ditch by defendant as the owner of the servient estate. In this defense, of course, logically, the question of the ownership of the excess water does not figure. "On what theory" asks defendant's counsel, "can the mere taking by a servient owner out of the conduit through which the owner of the easement exercises his right constitute a violation of the easement, unless the water taken is water which the dominant owner is entitled to carry across the lands of the servient owner?" This means, of course, that the servient owner, finding more water flowing in a ditch across his lands than the owner of the easement is entitled to carry therein, may confiscate the excess water, as an alternative remedy to the ordinary one of preventing the dominant owner from turning such excess into the ditch at all. Defendant is not really attempting to establish here by this defense a right to have its own water flow in the ditch along with that of plaintiff, but a right to take from the ditch, as the servient owner, water already reduced to possession by plaintiff and brought for a considerable distance through a portion of the ditch to which it has no possible claim. As by the defense of reception, so here, it is endeavoring to substitute for the right which it may have to compel plaintiff to permit the water to which it lays claim to flow uninterruptedly down Little Butte creek to its own point of diversion, a right to have such water delivered to it by plaintiff at such point as it may select where plaintiff's ditch crosses its land.

Nothing in the case of Hoyt v. Hart, 149 Cal. 722, 87 Pac. 569, relied upon by defendant, supports such a substitution. Even if the court had found that defendant had the right to use, jointly with plaintiff, that portion of the ditch which crosses its lands for the carriage of water to which it was entitled, such finding would not justify the acts complained of here. If plaintiff has taken from Little Butte creek water to the flow of which to its own land defendant is entitled, or if plaintiff, by enlarging the ditch, has imposed a greater burden on the servient estate than it should rightfully bear, defendant is not now, nor has it ever been, without remedy. But

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such remedy is not the tapping of plaintiff's ditch and the taking of water therefrom, whether such taking be called recaption or consistent use.

These considerations dispose of defendant's contention that the master erred in holding that a prima facie case was established in favor of plaintiff when, from the pleadings and from the admissions of defendant, it appeared that plaintiff was the owner of the ditch in question and that defendant was taking the water therefrom, and would continue to do so unless restrained by the court. The same is true as to the contention that the master erred in sustaining objections to certain questions propounded to the witness McCoy. The testimony sought to be elicited by the questions had to do with the alleged enlargement of the ditch in 1906, and was relevant only to the defenses held to be unsound. As to the alleged error in sustaining objections to the testimony of the witness Newman, it is sufficient to say that such testimony might well have been rejected because of the time at which it was offered, and in any event, even if admitted and given full credit, it could not have affected the finding of the court that defendant's taking of water from the ditch was not open, uninterrupted, and of such a character as to raise a foundation for prescription.

Though there are 55 assignments of error, there is no point made by any of them that is not disposed of by what has been said above.

The decree of the District Court is affirmed.

(245 Fed. 454)

NORTHERN PAC. RY. CO. v. VAN DUSEN HARRINGTON CO.

(Circuit Court of Appeals, Eighth Circuit. July 2, 1917.)

No. 4960.

COURTS ⟹262(2)—FEDERAL COURTS—EQUITY JURISDICTION—ADEQUATE REMEDY AT LAW.

A bill to compel a railroad company to issue a bill of lading requiring it to carry and deliver at a place on the line of another road a single carload of wheat owned by complainant does not state a cause of action within the jurisdiction of a federal court of equity, there being an adequate remedy at law by an action for damages.

Appeal from the District Court of the United States for the District of Minnesota; Page Morris, Judge.

Suit in equity by the Van Dusen Harrington Company against the Northern Pacific Railway Company. From an interlocutory order granting a mandatory injunction, defendant appeals. Reversed.

B. W. Scandrett, of Omaha, Neb. (C. W. Bunn and Charles Donnelly, both of St. Paul, Minn., on the brief), for appellant.

Harold G. Simpson, of Minneapolis, Minn., for appellee.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

CARLAND, Circuit Judge. This is an appeal from an order of the District Court assuming to act under its equitable jurisdiction, com-

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manding the appellant to forthwith sign, issue, and deliver a bill of lading to appellee under which Northern Pacific car No. 19482 will move to Evansville, Ind. The order appealed from, while for all practical purposes a final order, was really an interlocutory mandatory injunction. The procedure leading up to the making of the order was as follows:

Upon the filing of a complaint on May 11, 1917, a subpœna was issued and served requiring the appellant to appear on May 19, 1917, to answer the same, and also to show cause why an order should not issue commanding the appellant to issue, sign, and deliver to the appellee a bill of lading as prayed for in the complaint. On the return day appellant appeared and filed a motion to dismiss the complaint, upon the ground, among others, that the subject-matter of the action was not within the jurisdiction of a court of equity, for the reason that the complaint showed that appellee had a plain, adequate, and complete remedy at law. Affidavits were also filed by both parties in opposition to and in support of the order to show cause. After hearing argument the court granted the order from which an appeal has been taken. So far as the record shows the main case is still pending in the court below on complaint and motion to dismiss. This statement is made for the purpose of showing that the case is not before us on pleadings and proofs, so that the merits of the controversy can be finally determined. We may, however, in determining the validity of the order appealed from, inquire as to whether the complaint states a cause of action cognizable in equity, as the objection made below that it does not is insisted upon here. The appellee states his cause of action as follows:

I. "That the complainant, the Van Dusen Harrington Company, is a corporation duly organized and existing under and by virtue of the laws of the state of Minnesota. That it is engaged in the business of buying, selling and shipping grain."

II. "The defendant herein is a duly organized and existing corporation. That it operates lines of railroad in this state and other states. That it is a common carrier for hire."

III. "The complainant shows that on or about the 8th day of March, 1917, Mark P. Miller Milling Company delivered to the Northern Pacific Railway Company, the defendant herein, at Moscow, Idaho, Northern Pacific car No. 19482, loaded with wheat consigned to Mark P. Miller Milling Company, Minneapolis, Minn. That the defendant accepted said car and undertook to transport the same in accordance with its duty as a common carrier and in accordance with all its duly filed and published rates and tariffs. That the defendant issued and delivered to said Mark P. Miller Milling Company its negotiable order bill of lading whereby it agreed to transport said car to Minneapolis, Minn., and there to deliver the same to the owner and holder of said bill of lading, or to deliver said car to such person or such place as the owner and holder of said bill of lading should duly designate, and that the defendant agreed and undertook to transport the said car in accordance with its duly filed and published tariffs and in accordance with all the rules and provisions contained in said tariffs."

IV. "That said Mark P. Miller Milling Company sold said car to the Van Dusen Harrington Company, the complainant herein, and indorsed, delivered, and transferred to the complainant the aforementioned order bill of lading. That the complainant is now the owner of the contents of said Northern Pacific car No. 19482, and is the owner of said negotiable order bill of lading."

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V. "Complainant further shows that it desires to forward said car to Evansville, Ind., over the lines of the defendant herein and over the lines of other carriers that connect with defendant's lines."

VI. "That Northern Pacific Railway Company's Tariff No. 11-E, I. C. C. No. 6127 duly filed, published, and in effect under Index 520, page 23, provides rates from Moscow, Idaho, to Minneapolis, St. Paul, East St. Louis, and other points beyond Minneapolis and St. Paul. That rule 46 of said tariff, found on page 22, provides as follows: 'Shipments may be diverted, reconsigned in transit, or held in transit for orders at points on the Northern Pacific Railway, Great Northern Railway, or Minneapolis, St. Paul and Sault St. Marie (at rate in effect on date of shipment from original point to final destination), it being understood that point at which diversion is accomplished must be on direct line of movement point of origin of final destination.' "

VII. "That Northern Pacific Railway Company's Tariff No. 770-H, I. C. C. No. 5898, provides as follows: 'A change in destination, consignee, or routing will be permitted on *all carload freight* whether in transit or after arrival at original destination.' "

VIII. "That the Southern Railway Company's tariff issued by W. A. Cameron, Agent, No. 401-A, I. C. C. D-85, provides for proportional rates from St. Louis, East St. Louis, and other points to Evansville, Ind., and that said Southern Railway Company connects with said defendant's rails and receives from defendant and transports freight delivered to it by defendant from St. Louis, East St. Louis, and other points to Evansville, Ind., and other points, and that said Southern Railway Company is now and at all times has been ready and willing to receive this particular car as well as other cars from said defendant at East St. Louis and transport the same to Evansville, Ind."

IX. "Complainant further shows that it has repeatedly requested and demanded that the defendant sign, issue, and deliver to the complainant a bill of lading in the form and with the provisions and contents of Exhibit A, hereto attached and hereby made a part of this complaint, or a bill of lading in any proper or lawful form under which said car will move to Evansville, Ind."

X. "Complainant further shows that the tariffs and rules of the defendant provide and agree that said car may be reconsigned at Minneapolis, Minn., to Evansville, Ind., via East St. Louis or to such other point as the owner may duly designate. That the defendant agreed to allow said car to be reconsigned at Minneapolis to Evansville, Ind."

XI. "Complainant further shows that it has done all things necessary and in compliance with the published rules, regulations, tariffs, and provisions of the defendant in order to entitle complainant to reconsign and forward said car to Evansville, Ind."

XII. "That the defendant, contrary to its duty as a common carrier, contrary to its contract, arbitrarily, illegally, and contrary to the laws and statutes of the United States and the state of Minnesota, has repeatedly refused and still refuses to sign, issue, or deliver to the complainant a bill of lading in the form and with the contents and provisions as shown in Exhibit A, or a bill of lading in any proper form under which said car may move to Evansville, Ind.

"In consideration whereof, and forasmuch as the complainant is remediless in the premises by the strict rules of the common law, and can only have relief in a court of equity, where this matter is properly cognizable and relievable, the complainant prays that your honors will order the defendant to forthwith issue, sign, and deliver to this complainant a bill of lading in the form and with the contents and provisions as in Exhibit A, or bill of lading in such other proper form that this car may move thereunder to Evansville, Ind. [Here follows prayer for subpœna and general relief.]"

Exhibit A, referred to in the complaint, was an ordinary bill of lading, whereby, if issued, the appellant agreed to carry the car of wheat mentioned in the complaint to Evansville, Ind. We assume, without deciding, that the trial court had jurisdiction of the case as a

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federal court under the proviso of section 24 and paragraph 8 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1092 [Comp. St. 1916, § 991, par. 8]). Coming to the question of the jurisdiction of the court below as a court of equity, we may quote the language used by Justice Van Devanter in Singer Sewing Machine Co. v. Benedict, 229 U. S. 481, 33 Sup. Ct. 942, 57 L. Ed. 1288:

"In the courts of the United States it is a guiding rule that a bill in equity does not lie in any case where a plain, adequate, and complete remedy may be had at law. The statute so declares (Rev. Stat. § 723), and the decisions enforcing it are without number. If it be quite obvious that there is such a remedy, it is the duty of the court to interpose the objection sua sponte, and in other cases it is treated as waived, if not presented by the defendant in limine. Reynes v. Dumont, 130 U. S. 354, 395 [9 Sup. Ct. 486, 32 L. Ed. 934]; Allen v. Pullman's Palace Car Co., 139 U. S. 658 [11 Sup. Ct. 682, 35 L. Ed. 303]. There was no waiver here. The objection was made by the demurrer, and again by the answer; and so, if it was well grounded, it was as available to the defendants in the Circuit Court of Appeals to prevent a decree against them there as it was in the Circuit Court. Boise Artesian Water Co. v. Boise City, 213 U. S. 276 [29 Sup. Ct. 426, 53 L. Ed. 796]."

In New York Guaranty Co. v. Memphis Water Co., 107 U. S. 205, 2 Sup. Ct. 279, 27 L. Ed. 484, the Supreme Court, in referring to Revised Statutes, § 723, now section 267, Judicial Code (Comp. St. 1913, § 1244), said:

"This enactment certainly means something."

We think it can be safely said that it means at least that the courts have not the power to dispense with the ancient rule of equity jurisdiction which prohibits suits in equity where a plain, adequate, and complete remedy may be had at law. An inspection of the complaint fails to disclose a single ground of equitable jurisdiction. Reduced to its lowest terms, the complaint charges that the appellant is in possession of a carload of wheat belonging to appellee, which it refuses to transport to Evansville, Ind. The real nature of the case cannot be disguised by the fact that appellee is simply demanding the issuance of a bill of lading, for the reason that the bill of lading, once issued, would oblige the appellant to transport the car of wheat. It cannot be disputed but that an action at law for damages is a complete and adequate remedy for the refusal by a common carrier to transport a single carload of wheat. The damages to be recovered are easily ascertainable, and in the present case would be the difference between the value of the wheat at Minneapolis and at Evansville, Ind., less expense of carriage. People v. New York, etc., R. R. Co., 22 Hun (N. Y.) 533.

Counsel for appellee in his brief, not content with sustaining the theory upon which the present action was brought, seeks to demonstrate that the action could have been brought and maintained on any one of four theories. The third theory advanced by counsel is stated in his brief as follows:

"Thirdly. The complainant could have asked for a straight writ of mandamus to compel the issuance of the bill of lading under the provisions of section 23 of the Interstate Commerce Act."

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If the theory so stated is correct, then the question as to whether appellee had an adequate remedy at law is not open to question, as the proceeding by mandamus is a proceeding at law.

Counsel further states as the fourth theory on which the action might have been brought that appellee could have asked for a mandatory order to compel the issuance of a bill of lading in compliance with section 20 of the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379), as amended (Act June 29, 1906, c. 3591, § 7, pars. 11, 12, 34 Stat. 595 [Comp. St. 1916, §§ 8604a, 8604aa]), commonly known as the "Carmack Amendment," and then he states that appellee adopted the fourth or possibly a combination of the third and fourth remedies. What is known as the Carmack Amendment is a part of section 20 of the Interstate Commerce Act, and it does provide for the issuance of a receipt or bill of lading by the receiving carrier, but no form of procedure is mentioned in section 20, except the District Court is given jurisdiction upon the application of the Attorney General of the United States at the request of the Interstate Commerce Commission, alleging a failure to comply with, or a violation of any of the provisions of the act to regulate commerce, to issue a writ or writs of mandamus commanding the carrier to comply with the provisions of the act. This proceeding in equity finds no support in any of the provisions of the Interstate Commerce Act, and as we have before said, if section 23 applies, then the remedy at law is adequate.

Counsel for appellee further insists that a court of equity has jurisdiction to enforce a plain duty imposed by statute, and as he claims the Carmack Amendment imposed a plain duty upon the appellant in this case to issue a receipt or bill of lading, a court of equity in a proper case may compel it to do so. We think counsel has confused the jurisdiction of a court of equity to issue a mandatory injunction to enforce a plain statutory duty, where the court for other reasons has equitable jurisdiction, with the question as to whether the court in the present case had any jurisdiction in equity at all. A court of equity has no more authority to enforce a duty imposed by statute than it has to enforce a moral of contractual duty. It will enforce either or all in cases where it has jurisdiction.

We will now notice some of the cases cited by counsel for appellee which it is claimed decide that the present case is one of equitable jurisdiction. In the first place it may be said that this is not a case where a statute has given a right without furnishing a remedy. According to counsel's own argument, he had a remedy by mandamus. The case of Wiemer v. Louisville Water Co., 130 Fed. 251, is cited. This was a case where the court issued a mandatory injunction compelling the water company to furnish the complainants with water in accordance with its duty. We have no doubt but that the jurisdiction of a court of equity was properly exercised in this case; but it is no authority for the exercise of equity jurisdiction in the case at bar, as the facts are entirely different.

The case of Coe & Milson v. Louisville & Nashville R. R. Co. (C. C.) 3 Fed. 775, is cited as being in point. This was a case where Coe & Milson applied to the court for a mandatory injunction compelling the

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railroad company to accept and deliver any shipments tendered to it; but that is not the present case. There is only one car involved here, and no allegation that there will ever be another.

The case of C., B. & Q. Ry. Co. v. Burlington, C. R. & N. Co. (C. C.) 34 Fed. 481, is also cited. This was an action by one railroad company to compel another railroad company to handle its cars. Manifestly there was no adequate remedy at law, and the case furnishes no support for the position of appellee in the present case.

The case of Covington Stockyards Co. v. Keith, 139 U. S. 128, 11 Sup. Ct. 461, 35 L. Ed. 73, is cited. In this case Keith, who was engaged in buying and selling live stock on commission as well as on his own account, brought the same to and shipped them from the city of Covington, Ky., over the Central Railroad. He owned certain live stock lots and yards in Covington, which were provided with all the necessary means of receiving, feeding, and caring for such stock as he purchased, or as might be consigned to him by others for sale; the receiver of the railroad tore up and rendered unsafe for use the connections which the railroad had with his stockyards. It was held that it was the duty of the railroad company to maintain these connections, and that a mandatory injunction would issue to compel the performance of the duty; but here the whole business of Keith was in jeopardy from day to day. Manifestly there was no adequate remedy at law.

The case of Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Ry. Co., 54 Fed. 738, 19 L. R. A. 387, was a case where the Pennsylvania Railroad Company, a connection of the Toledo Railroad, refused to accept cars for transportation tendered it by the Toledo Railroad on the ground that the Pennsylvania employés, being union men, refused to handle cars from a nonunion railroad. Manifestly this case is not authority for appellee. All the cases cited by the learned counsel are to the effect that, if a court of equity has jurisdiction of a case, it may in a proper case issue a mandatory injunction. It is further insisted that this court will take judicial notice of the fact that the refusal to forward the car in question, as well as many other cars, will cause a multiplicity of suits, which in itself is sufficient to sustain equitable jurisdiction. We have no reason to take judicial notice that there is or will be a refusal by appellant to forward any other cars of appellee, and, if we had, we cannot enlarge the facts stated in the complaint, and, thereby enlarge the judgment which the court may render. The trial court dealt with one car, and that is all there is in the case. Moreover, the successful prosecution of the present action would not save a multiplicity of suits, any more than an action at law, for the reason that the relief asked only affects one car, and the decree could not be broader than the complaint; so there is no merit in this contention.

The court below having no jurisdiction as a court of equity, we may not consider whether the complaint otherwise states a cause of action.

The order appealed from is reversed.

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(245 Fed. 460)

BLACK v. YOUMANS, District Judge.*

(Circuit Court of Appeals, Eighth Circuit. August 2, 1917.)

No. 179.

EXCEPTIONS, BILL OF ⚷53(3)—MANDAMUS TO COMPEL SETTLEMENT.

A trial judge cannot be compelled by mandamus to sign a bill of exceptions, purporting to contain a summary of the testimony of the witnesses in narrative form, unless it contains the substance of all the material testimony given on the trial, and his return that it does not do so is conclusive; but he may be required to settle such portion of the proposed bill, aside from the testimony, as correctly sets forth the proceedings.

Petition by Lon W. Black for a writ of mandamus to F. A. Youmans, United States District Judge. Writ denied.

Ira D. Oglesby, of Ft. Smith, Ark., for relator.

J. H. Evans, of Booneville, Ark., for respondent.

Before CARLAND, Circuit Judge, and RINER and MUNGER, District Judges.

MUNGER, District Judge. Petition for writ of mandamus to compel respondent to settle and sign a bill of exceptions. The relator instituted an action for slander, claiming recovery on 11 causes of action. The defendant had verdict and judgment in his favor. The plaintiff requested and was allowed 100 days in which to prepare and file a bill of exceptions. This period extended 37 days after the expiration of the term. The defendant employed a stenographer, who made full notes of the testimony and proceedings at the trial. The trial consumed 6 days, and the testimony, if it had been extended into typewritten form, would have embraced 700 to 800 pages. The plaintiff prepared a draft of a proposed bill of exceptions, consisting of 46 pages of testimony in narrative form, of 7 pages of exhibits, and of 12 pages relating to the giving and refusal of instructions and proceedings at the trial. This draft was prepared from recollection of the evidence and from notes of the testimony made by relator's counsel. The stenographer was ready to prepare a transcript of his notes for the use of the plaintiff; but plaintiff was unable to avail himself of this assistance, because of lack of means.

The proposed bill of exceptions was presented to the trial judge for allowance, but he refused to sign it. The relator alleges in his petition that this bill "contained the substance of all the material testimony given in the trial." The respondent gave as a reason for his refusal to sign the bill, and avers in his return, that the bill did not present the testimony of any witness as it was given at the trial, either in substance or form.

At the hearing of the application to settle the bill of exceptions, the trial judge called in the stenographer and had him estimate the number of pages that the testimony of each witness would embrace, if the notes were extended, as compared with the proposed narrative statements of the witnesses' testimony. The relator contended that it was the duty

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*Rehearing denied January 7, 1918.

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of the defendant to suggest any amendments or corrections necessary to make the bill a complete record of the testimony; but the court found that the bill was so abbreviated, disconnected, and incomplete that amendment was impracticable and it would have to be entirely rewritten.

As the case is presented, no question is made of the correctness of that portion of the proposed bill which relates to the proceedings on the trial, other than the record of the testimony. The plaintiff requested some instructions that were refused, and excepted to portions of the court's charge to the jury. That portion of the proposed bill which does not involve the testimony, or as to which the testimony stated is correct, should have been settled by the court, as a review may be asked of rulings which do not involve the sufficiency of the evidence.

The arguments in the briefs center about the allowance of the bill as a record of all the testimony on the trial; but this contention is not open, as the petition alleges no more than that it contains the substance of the material testimony. This allegation is denied in the return made by the trial judge. He was in a position to know what testimony was given, and he refreshed his recollection by the aid of the stenographer's notes. This court cannot say that the proposed condensation of the testimony states the substance of the testimony given on the trial, because we are not advised as to the testimony that was received, and opinions may differ widely as to what constitutes the substance of witnesses' testimony. Gulf, C. & S. F. R. Co. v. Washington, 49 Fed. 347, 1 C. C. A. 286. Moreover, the return of the judge that the proposed bill is not the substance of the testimony is a statement with reference to facts occurring before him, and within his personal knowledge, and his return is conclusive. In re Streep, 156 U. S. 207, 15 Sup. Ct. 358, 39 L. Ed. 399; Chateaugay Ore & Iron Co., Petitioner, 128 U. S. 544; 9 Sup. Ct. 150, 32 L. Ed. 508; Ex parte Bradstreet, 4 Pet. (29 U. S.) 101, 7 L. Ed. 796; Thatcher v. Killits, 195 Fed. 471, 115 C. C. A. 373; Shepard v. Peyton, 12 Kan. 616; Orr v. Judge, 23 Mich. 536; Sansome v. Myres, 77 Cal. 353, 19 Pac. 577; State v. Small, 47 Wis. 436, 2 N. W. 544; State v. Hawes, 43 Ohio St. 16, 1 N. E. 1; Benedict v. Howell, 39 N. J. Law, 221; Sikes v. Ransom, 6 Johns. (N. Y.) 279.

The tender of a bill of exceptions which is proposed in good faith as a summary of the material testimony ordinarily requires that the opposite party be called upon to make any objections he may have to its insufficiency, and the court may require amendments to make the bill complete; but, while mistakes can be corrected and omissions supplied, the party proposing the bill must use good faith to make it full and fair, so that the burden is not cast upon the court or opposite counsel of preparing a new bill. The trial judge found that this bill was so seriously defective that it did not present the testimony of any of the 40 witnesses as it was given, either in substance or in form. The very brief narratives exhibited in the proposed bill as the testimony of the several witnesses, without any designation of direct or cross examination, tend to substantiate the view of the trial judge. He found that it would be necessary to have the testimony entirely rewritten; but this suggestion met no favorable response, as the relator stood upon his insistence of the bill as then proposed. Under these circumstances a writ should not

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be awarded to require the judge to certify to the testimony as the substance of all the evidence introduced.

The judge should settle such portion of the proposed bill of exceptions as conforms to the facts as heretofore stated, and it is presumed that the judge will proceed in accordance with the views here announced. The issuance of the writ, therefore, will be withheld. No costs will be allowed against the respondent. In re Haight & Freese Co., 164 Fed. 688, 90 C. C. A. 285.

(245 Fed. 462)

TODD v. ALDEN.

In re MOTOR TRUCK SALES CO.

(Circuit Court of Appeals, Eighth Circuit. July 23, 1917.)

No. 4843.

1. BANKRUPTCY ⟹461—TIME FOR APPEAL FROM ORDER—EFFECT OF REHEARING.

   Where, after an order allowing a claim in bankruptcy, a rehearing is granted, the time for taking an appeal is extended, and runs from the time the order is made final.

2. REVIEW OF FACTS.

   Facts considered and orders affirmed.

Appeal from the District Court of the United States for the District of Minnesota; Wilbur F. Booth, Judge.

In the matter of the Motor Truck Sales Company, bankrupt. W. W. Todd, trustee, appeals from an order allowing the claim of W. A. Alden. Affirmed.

Allen & Fletcher, of Minneapolis, Minn., for appellant.

George S. Grimes, of Minneapolis, Minn., for appellee.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

CARLAND, Circuit Judge. This is an appeal from two orders of the bankruptcy court, made on January 6, 1916, and May 18, 1916, which allowed the claims of W. L. Alden, based upon four promissory notes given by the Motor Truck Sales Company to said Alden for the following amounts: Claim No. 31, $3,300; No. 33, $3,100; No. 34, $1,500; and No. 35, $1,300.

[1, 2] It is urged that the trial court erred in deciding that these notes represented loans made to the bankrupt corporation, and were not subscriptions for, or contributions to, the capital stock of said corporation. The question for consideration is entirely one of fact. The referee in bankruptcy in a well-considered report found that the amounts represented by these notes were loans to the corporation. The District Judge, upon review of the report of the referee, although not wholly satisfied, did not disturb the finding of the referee, as the latter had heard and seen the witnesses.

We have carefully read the evidence, and are of the opinion that the orders, in so far as they are complained of, should be affirmed.

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The evidence fairly sustains the position of the referee. There was a motion filed to dismiss the appeal upon the ground, among others, that the order appealed from was made January 6, 1916, and that no appeal was taken therefrom until May 26, 1916. If this was the true state of the record, the appeal should be dismissed, as not taken in time. An inspection of the record, however, has convinced that a rehearing of the order of January 6, 1916, was granted, and the matter was not finally disposed of until May 17, 1916. The granting of a rehearing operated to extend the time of the taking effect of the order of January 6th, and therefore we conclude that the appeal was taken in time.

The motion to dismiss is denied, and the orders appealed from affirmed.

(245 Fed. 463)

WESTINGHOUSE MACH. CO. et al. v. C. & G. COOPER CO.

(Circuit Court of Appeals, Sixth Circuit. August 4, 1917.)

No. 2916.

1. PATENTS ⟹328—VALIDITY AND INFRINGEMENT—VALVE MOTION FOR GAS MOTORS.

   The Mees patent, No. 921,864, for a valve motion for gas motors, claim 5, is void for lack of invention in view of the prior art. Claims 6, 7, and 8 *held* not anticipated, valid, and infringed.

2. PATENTS ⟹176—WORDS AND PHRASES—"SIMULTANEOUS."

   The word "simultaneous," as used in a patent claim, does not imply absolute synchronism from beginning to end, but has some elasticity. Events may be substantially or relatively simultaneous, although not absolutely so.

   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Simultaneous.]

3. PATENTS ⟹174—CLAIMS—CONSTRUCTION.

   Though it be conceded to be a close question whether invention was involved in adding another element to an existing combination, yet, if invention is found, this concession does not lead to any particularly narrow construction.

Appeal from the District Court of the United States for the Eastern Division of the Southern District of Ohio; John E. Sater, Judge.

Suit in equity by the Westinghouse Machine Company and others against the C. & G. Cooper Company. Decree for defendant, and complainants appeal. Reversed and remanded.

This is a suit for infringement of patent No. 921,864, for a valve motion for gas motors, issued May 18, 1909, to Gustave Mees, and assigned to appellants (hereafter called plaintiffs). The court below held that the structure made by the appellee (hereafter called defendant) did not infringe, and dismissed the bill.

Engines of the type here involved are operated by successive explosions of a mixture which is a combination of air and a gas of sufficiently constant quality. Increased power from the explosion may be had by changing the proportions of gas and air, so as to give a more highly explosive mixture, or by increasing the quantity of the mixture for one explosion. The former method may be designated as quality control; the latter, quantity control. By the use of either, the speed of the engine revolutions may be varied; but for some purposes—and, typically, for driving a dynamo—it is important that

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⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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the speed be constant, and since the load varies from time to time, and the increased load tends to decrease the speed, it is essential in such engines that there should be some automatic control through the aid of a governor which will increase the power to meet an increased load, and vice versa, so that the speed may be constant.

Generally speaking, this result had been fairly accomplished in various ways, before Mees' invention. It had been most common to mix the air and gas in a mixing chamber at some distance from the inlet valve in the engine cylinder, and to allow the governor to operate a throttle in a passageway from the mixing chamber to the inlet valve. This was quantity control. Devices had also been applied in which the governor regulated the size of the gas ports opening into the mixing chamber, thus effecting quality control of the mixture therein. From these more common plans, Mees departed considerably. Instead of having merely a pipe leading from the mixing chamber to the inlet valve, he constructed a cylindrical chamber mounted on the (vertical) cylinder, and in which chamber the vertical operating rod or stem of the inlet valve was axially located. In the wall of this chamber, he provided, toward the upper part, one or more ports for admitting air, and in the lower part one or more entrance ports for gas. He then mounted upon this valve stem, so as to reciprocate therewith, an open-ended, hollow piston sliding in this cylindrical chamber and having ports registering with those in the chamber wall, whereby the longitudinal reciprocation of the valve rod as the valve opened and shut, would open and shut the air and gas ports, and the piston became properly called a piston valve. As the inlet valve was opened inwardly into the cylinder by the suction stroke of a four cycle engine, the piston valve would be drawn downwardly and the air and gas ports opened to an extent determined by the prearranged adjustment of the parts, and the air and gas, in the predetermined proportions, would pass together through the inlet valve into the engine cylinder. As the inlet valve was released by its cam and seated by its spring in the usual way, the piston would rise and the gas or air ports both would be shut off.

As so far described, the element of automatic control is not involved, there being merely a permanent or semi-permanent adjustment; but Mees also made his piston revoluble upon the valve stem, and provided a suitable governor and connection to give it automatic revolution through a fraction of its circumference. If ports in the chamber wall and in the piston were of the same width (circumferential extent), the result was that when the governor, by increased speed, caused the piston to be revolved from that rotary position where the ports in the piston and in the chamber wall precisely registered, these ports were partly cut off and became of less width, so that their opening by the reciprocating motion of the piston provided a smaller area than before, and admitted less air and less gas; hence there was a smaller quantity of explosive mixture, less compression, less force in the explosion, and an automatic tendency to diminish speed. The slowing down of the engine would carry the reverse result through the governor to these ports and tend to increase the speed.

In his drawings and specification, Mees showed and described three alternative forms. In one of them, the gas ports and the air ports were of the same circumferential width, and so placed that both began to close at the same instant, and the rotary motion of the piston would, therefore, close both air and gas ports in precisely the same proportion, from the beginning to the end of the closure. This was quantity control. In another form, the piston was shorter and its reciprocation did not reach or affect at all the air ports, which remained constantly open, but in this longitudinal motion it opened and closed the gas ports, and in its rotary motion it throttled them. This gave a quality control. In still other drawings and descriptions, Mees showed a third form which combined the two control methods. The piston opened and closed simultaneously the air and gas ports, but the latter were circumferentially wider than the former, whereby the throttling action was exerted first upon the gas ports alone and then upon both simultaneously. In this form, as the speed became too great, the gas supply would first be lessened and the quality and explosive power of the mixture diminished; and

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after this quality regulation had taken due effect, if the speed were still too high, both air and gas would be simultaneously reduced and the quantity of the charge lessened.

With this description of Mees' invention, his claims will be intelligible. There are nine. The first four and the ninth call for many details and seem to be specific in form. Only the remaining claims, 5, 6, 7, and 8, are in suit. They are as follows:

"5. In a valve motion for gas motors an inlet valve, a piston valve *K*, controlled simultaneously with the said inlet valve by a cam making an invariable stroke and revoluble by the governor of the motor.

"6. In a valve motion for gas motors an inlet valve, a piston valve *K* controlled simultaneously with the said inlet valve by a cam and revoluble by the governor of the motor, said piston valve having gas ports and air ports and adapted to throttle the air and gas supply for the cylinder simultaneously.

"7. In a valve motion for gas motors, a piston valve *K* moved simultaneously with the inlet valve *E* and revoluble by the governor of the motor said piston valve having gas ports *m'* and air ports *i'*, and being adapted to throttle the air and gas supply for the cylinder simultaneously and in equal parts.

"8. In a valve motion for gas motors an inlet valve, a piston valve *K* controlled simultaneously with the said inlet valve by a cam making an invariable stroke and revoluble by the governor of the motor, said piston valve having gas ports and air ports and adapted to throttle the air and gas supply for the cylinder simultaneously, the said gas ports being constructed to be closed before the closing of said inlet valve, whereby the piston valve acts simultaneously as a regulating device and as a mechanically controlled closing means for the gas ports."

For convenience, we call the longitudinal motion of the piston "reciprocating" and the rotary motion "revolving," though neither term is exclusively accurate.

J. S. Green, of East Pittsburgh, Pa., and E. W. McCallister, of Cincinnati, Ohio (Paul Synnestvedt, of Pittsburgh, Pa., of counsel), for appellants.

Isaac B. Owens, of New York City (Patrick A. Bolger, of New York City, of counsel), for appellee.

Before KNAPPEN and DENISON, Circuit Judges, and EVANS, District Judge.

DENISON, Circuit Judge (after stating the facts as above). [1] When we remember that Mees' device involves three functions, that of a cylinder inlet valve, that of a reciprocal slide valve cut-off for the gas or for the gas and air, and that of a rotary slide valve throttle for the gas or for the gas and air, the distinctions between these four claims are apparent. Claim 5 has no reference to throttling both air and gas. In effect, it calls only for a piston shut-off valve reciprocating simultaneously with the inlet valve and revolving to throttle either gas or air. Claim 6 further specifies that the controlling means should act simultaneously upon the air and gas supply. Claim 7 is like claim 6, but it has the further limitation that the simultaneous throttling of the air and gas supply shall be in equal parts. Claim 8 also provides for simultaneous throttling of air and gas (like 6) but contains an additional limitation pertaining to the longitudinal or shut-off motion of the valve, viz. that the gas ports should be closed before the closing of the inlet valve.

We have to meet the usual questions of validity and scope, and we may go at once to that one of the earlier patents which, when

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each one is considered by itself, most closely approximates Mees' general thought. This is the German patent to Grohmann, of October 11, 1890. This regulated the speed of the engine by a method not yet mentioned, known as the "hit and miss" method, in this variety of which, when the engine speed became too high, the governor caused the gas ports to be wholly closed, whereby the suction stroke took in air only, and an explosion was cut out. Grohmann has a cylindrical chamber with air and gas ports in its walls, and which is located in close proximity to what is claimed to be the inlet valve, and through which chamber the stem of this valve passes axially. He also has a piston valve carried by and reciprocating with the inlet valve stem, having ports registering with the gas ports in the chamber wall and opening and closing them, and being revoluble on the stem under governor control. The differences between Grohmann and Mees are four: (1) The so-called inlet valve does not open directly into the working cylinder but into a supplementary chamber, the passage between which and the working cylinder is a part of the time closed by another valve so that the charge may receive compression in this supplementary chamber, but which other valve is open at the moment of explosion, the supplementary chamber and the working cylinder then being one continuous space. Plaintiffs' counsel insist that this Grohmann valve, the stem of which carries the piston, is not the inlet valve of Mees. (2) The gas ports are either wholly opened or wholly closed by the governor action, thus making "hit and miss" control as above stated. (3) The cylindrical chamber, in which the piston reciprocates and revolves, is a short distance above the inlet valve, instead of extending thereto, and is separated by a perforated diaphragm from the space immediately above the inlet valve. The result is that gas only is received into this cylindrical chamber, which does not serve as a mixing chamber at all, and that the gas passes into the mixing chamber through the perforations in the diaphragm which are never closed, but the air passes into the mixing chamber through always open ports. (4) The gas and air are not simultaneously throttled.

It is insisted that claim 5 reads upon Grohmann, and is therefore invalid. Plaintiffs' counsel is charged with admissions to this effect; but, on the contrary, the record shows that, while frankly conceding the language of the claim to be capable of such a reading, he contended that it should not be so interpreted, and that, when rightly construed, it was valid. The file wrapper history almost compels the conclusion that this claim should not be read upon Grohmann, because Grohmann was cited and considered, and, in spite of this reference, the claim was allowed. It follows that both the Patent Office and Mees must have joined in the intent that the claim should not be so read as to make a device like Grohmann an infringement; but this conclusion does not necessarily imply that the claim is valid. If we say that its calls for the inlet valve and the piston valve rightly imply any one of the first three distinctions above recited, we must think that no one of the three involves invention in any sense sufficient to sustain claim 5, with any construction of which the language of claim 5 is capable. To change from the hit and miss method is only to

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close the ports gradually instead of quickly, and the gradual closing was very common; in every substantial sense Grohmann's so-called inlet valve is the equivalent of that valve in Mees—that is, in every sense which pertains to the substantial utility of Mees' conception; and the entrance of the gas to the mixing chamber is both shut off and throttled by Grohmann's piston valve, in spite of the presence of the perforated diaphragm between the piston and the inlet valve. Each of these changes is, and all put together are, so unsubstantial in form and so negligible or so old in result that invention cannot be predicated upon them alone. We conclude that claim 5 is invalid.

The remaining question of validity is whether the limitation to a simultaneous throttling of air and gas ports, as found in claims 6, 7, and 8, imparts patentability. It plainly would, if it was new in itself, but since it had been accomplished in other associations, the question becomes more doubtful. The record presents several earlier patents which throttled air and gas simultaneously. In one (Crossley, British), there was a piston valve in a cylindrical casing with registering air and gas ports, the valve was rotated continuously through connection with a rotating part of the engine and it was reciprocable slightly under governor control, this longitudinal motion throttling both air and gas ports. This piston valve was not on or associated with a cylinder inlet valve, but was constantly open into a mixing chamber, from which passages extended to the various cylinder heads. In another (Tangyes, British), a valve of this form was rotated under governor control and thereby throttled air and gas ports simultaneously, but it had no reciprocating motion, and it also was always open into mixing chambers at a distance from the cylinder inlet valves. In others (e. g., Klein), air and gas were both throttled, not by any rotary motion of the piston, but by regulating the extent of its longitudinal stroke. It would not be demonstrably wrong to say that there was no invention in adding to the Grohmann device the additional and known modifications by which a piston valve would throttle both air and gas instead of gas alone; but we cannot be satisfied to adopt that conclusion. It is not merely a substitution of an equivalent for one element of Grohmann; adding this function to Grohmann involves considerable reorganization. His diaphragm will be unnecessary and naturally discarded. His cylindrical chamber must be extended so as to receive the air ports, the piston correspondingly extended and provided with ports and the air entrance passages rebuilt. This combination in one structure, unquestionably first made by Mees, of the inlet valve and its stem, the piston valve in immediate association with it, reciprocating with it to open and shut both air and gas ports with each suction stroke and revoluble under governor control to throttle both air and gas ports, had considerable theoretical operating advantages over any previous combination, and at least some practical advantages; the Grohmann patent was published in 1890, and, although there was great activity in this art during the intermediate 13 years, no one before Mees had thought of modifying it as he did; the plaintiff, a large manufacturer of gas engines of this general class, has either found this device desired or has thought proper to supply it in some of the largest in-

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stallations in the country; and all competing manufacturers, until defendant's appearance, had acquiesced in the monopoly. In the light of these things, we think claims 6, 7, and 8 are valid. The distinctive feature of claim 8, as compared with 6, is the advance closing of the gas port. It is a mistake to suppose that the "whereby clause" of 8 refers alone to this advance closing; it refers to the whole claim, and might as well have been used on claim 6. Since this distinctive feature was not new, and is not more appropriate to the combination of claim 8 than it is to old forms, we are not clear that there is patentable distinction between 6 and 8. However, this seems of no practical importance.

In the conclusions so far stated, we concur with the court below. It remains to consider those limitations of claims 6, 7, and 8 which affect the question of their application to defendant's device. We find nothing in the specification or claims or state of the art requiring that the air ports should be of the same longitudinal extent as the gas ports, or that the air ports should separately or collectively have the same area as the gas ports.[1] Some figures of the drawing show only two air ports and two gas ports and all seem to be of the same size, but the specification says nothing about this. Obviously they would not be of the same size, unless it was desired to have one-half gas and one-half air. It appears that, in order to get an explosive mixture, these proportions must be varied according to the richness of the gas, and it is not to be supposed that Mees was ignorant of what everybody knew. His invention had nothing to do with the initial or predetermined proportions of gas and air, there was no occasion for him to describe or show anything on that subject and there can be no reasonable inference, except that he contemplated that the engine builder would proportion or adjust the relative areas of air inlets and gas inlets as the builder might think best.

It is not directly important if the suction stroke does not open or close air and gas ports at the same instant or to the same extent. The mixture is formed by all the air and gas entering through all the ports uncovered during the whole stroke. The word "simultaneously" in its first use in each of these three claims, has no reference to air and gas ports, but only to the concurrent reciprocation of inlet valve and piston valve.

[2] Nor can we imply this limitation (to simultaneous and equal uncovering by each stroke) from the stated limitation to simultaneous throttling of air and gas. The word "simultaneous" does not imply absolute synchronism from beginning to end; it has some elasticity. Events may be substantially or relatively simultaneous, although not absolutely so. It could hardly be denied that racing horses go around the track simultaneously, although a stop watch may show slight differences between them on the way and at the finish. In these engines, the reciprocating opening motion is very rapid; the rotary

[1] It is said that the examiner's letter stated that Mees' air and gas ports must be "formed in a certain way," and that Mees did not protest; but this was with reference to a specific claim and construction, later abandoned and canceled from the drawings.

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throttling motion is relatively slow. It is true that if the gas ports are not all opened at the same time and to the same extent as the air ports are, but the two are so arranged longitudinally that the reciprocating action opens one, wholly or partly, before it does the other, there will be an instant when rotary motion of the piston may be throttling one but not the other, because at the other there will not, at that instant, be registration. But this is only in theory, and we can almost say only in imagination. Assuming (perhaps not with perfect accuracy) that the opening motion of the inlet valve occupies one-fourth of the time between explosions, and that 600 revolutions per minute is an ordinary speed, this opening motion will consume one-fifth of a second. If we further assume that during some fraction of the opening stroke the throttling action was affecting air ports and not gas ports, we have a very minute period of time during which the throttling is proceeding nonsimultaneously; and even when the port that was not rotarily throttled because it was longitudinally closed is later opened, it opens into a throttled condition; in a very fair sense, it had been throttled while closed. It is to be observed, also, that during three-fourths of the time, all the ports are closed, and yet, the throttling action to which the specification and claims refer as "simultaneous" is proceeding. This observation confirms the conclusion that completely and constantly concurrent throttling from beginning to end was not contemplated.

Comparison of plaintiffs' patent with the specific form used by defendant also confirms this same conclusion. The patent drawings show some instances where air and gas ports will have the same open area all the time, and show another form where they will not, but where the throttling motion in its rotary progress will be closing an open air port both before and after it is closing an open gas port. It is true this alternative construction may have special reference to claim 5, but at least it illustrates that Mees intended to adjust the longitudinal position of air and gas ports as might be advisable. Defendant's form made express provision for such adjustment manually. His air and gas ports in his piston valve were of the same longitudinal extent, but in his stationary cylindrical chamber the gas ports could be varied from nothing up to a size as large as ports in the piston. It follows that the effective gas and air ports (the registering areas of chamber ports and piston ports) in defendant's device might be of precisely the same size, or that the gas ports might be of much less size, according to the quality of gas that was to be used in a given installation. The particular use which was proved was with a rich gas, and the adjustment was such that a vertical stroke took in 19 parts of air to 1 of gas; but Mees, who specifies nothing on this subject, could just as well build his device to take in 19 parts of air and 1 part of gas (as defendant did), and the defendant could just as well adjust its existing device to take in equal parts of air and gas (as Mees did). It is not reasonable to suppose that a dissimilarity so fortuitous can be vital.

[3] While we have conceded that the question whether there was invention in bringing into an existing combination the simultaneous throttling function was a close question, that concession does not

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lead to any particularly narrow construction of the word "simultaneous." Mees did not invent some novel supersynchronism in the place of an imperfect one theretofore existing, so that he should be confined to that extreme degree of perfection. He first disclosed—in this combination—any kind or degree of simultaneous action. Since a single suction stroke and the following single explosion could have no appreciable effect upon the engine's speed and the reflex action of the governing devices, but any such effect must come from a considerable number of successive strokes and explosions, it is additionally clear to us that the patent does not contemplate a single stroke as the unit concerning which simultaneous throttling must exist, but contemplates rather that substantial or appreciable period of time during which a rotary piston motion is in progress, or that part of the circle covered thereby, and that if during or by that completed unit both air and gas ports have been throttled so that the total area of each is less for those reciprocating strokes made thereafter than it was for the reciprocating strokes made theretofore, the throttling of both has been simultaneous, and Mees' invention, in this respect, has been appropriated.

"In equal parts," as used in the specification and in claim 7, necessarily means "in equal fractions" or "in equal proportions," and not "in equal area." It is the whole theory of the patent, so far as it pertains to a throttling "in equal parts," that this is for the express purpose of maintaining a constant quality; and if it were considered that whenever two square inches are throttled off on the air ports two square inches must also be cut off on the gas ports, it will result that the quality would always be changed—excepting in the one possible, but rather improbable, instance where air and gas ports were of the same initial total area.

Giving to claims 6, 7, and 8 the construction which we have approved in the foregoing paragraphs, infringement by the defendant is not to be questioned.

If, within a time to be fixed by the District Court, plaintiffs disclaim claim 5 and file in that court certified copy of such disclaimer, they may have the usual decree for injunction and accounting on claims 6, 7, and 8. They will recover the costs of this court, but not of the court below. Herman v. Youngstown (C. C. A. 6) 191 Fed. 579, 587, 588, 112 C. C. A. 185.

The decree is set aside, and the case remanded for further proceedings in accordance herewith.

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(245 Fed. 521)

CONSOLIDATED MUT. OIL CO. et al. v. UNITED STATES (two cases).

(Circuit Court of Appeals, Ninth Circuit. August 20, 1917. Rehearing Denied October 8, 1917.)

Nos. 2787, 2788.

MINES AND MINERALS ⟹36—OIL PLACER CLAIMS—RIGHTS OF CLAIMANTS—EFFECT OF WITHDRAWAL ORDER.

An oil placer mining claim, located on surveyed land by an association of eight persons, pursuant to Rev. St. §§ 2329–2333 (Comp. St. 1916, §§ 4628–4632), and covering a quarter section, constitutes a single claim, and under Act Feb. 12, 1903, c. 548, 32 Stat. 825 (Comp. St. 1916, § 4636) development work done on any one of a group of such claims not exceeding five, lying contiguous and owned by the same person or association, inures to the benefit of all, where it tends to their development. The President's proclamation of September 27, 1909, withdrawing certain oil lands from entry provides that "all locations or claims existing and valid on this date may proceed to entry in the usual manner after field investigation and examination," and Act June 25, 1910, c. 421, § 2, 36 Stat. 847 (Comp. St. 1916, § 4524) provides that "the rights of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a bona fide occupant or claimant of oil or gas bearing lands, and who at such date is in the diligent prosecution of work leading to the discovery of oil or gas, shall not be affected or impaired by such order so long as such occupant or claimant shall continue in diligent prosecution of said work." At the time of the withdrawal proclamation one of the defendants, who was the owner of four contiguous quarter section claims, was in possession of the same through his lessee, which was then diligently prosecuting the work of development, and had commenced a well on one claim and expended $20,000 in preparations for drilling on each claim. This work was continued, and oil was found in paying quantities. In 1914 defendant entered and paid for the land, and there was issued to him a final receipt. *Held:* (1) That the exception in the President's proclamation in favor of existing and valid locations did not apply to claims on which oil had been discovered and to which the claimants therefore had an indefeasible equitable title, but applied to all locations to which the claimants had some valid right; (2) that the work done inured to the benefit of all of defendant's claims, and that under the facts he acquired a valid title which could not be questioned by the United States.

Gilbert, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Southern Division of the Southern District of California; Maurice T. Dooling, Judge.

Two suits in equity by the United States against the Consolidated Mutual Oil Company and J. M. McLeod. Decrees for complainant, and defendants appeal. Reversed.

See, also, North American Oil Consolidated v. United States, 245 Fed. 533, 157 C. C. A. 645.

U. T. Clotfelter, of Los Angeles, Cal., and A. L. Weil, Charles S. Wheeler, and John F. Bowie, all of San Francisco, Cal., for appellants.

E. J. Justice, F. P. Hobgood, Jr., Frank Hall, Jas. W. Witten, and A. E. Campbell, Sp. Asst. Attys. Gen., all of San Francisco, Cal., and

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Albert Schoonover, U. S. Atty., of Los Angeles, Cal., for the United States.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. The subject-matter of case No. 2787 is the northeast quarter, and of case No. 2788 the northwest quarter, of section 28, township 31 south, range 23 east M. D. M., and the oil contents of those lands. The facts in each case being substantially the same, the cases have been argued and submitted together.

The appellants, who were defendants in the court below, being in the possession of and claiming the right to the land and the oil it contained, which oil they were extracting by means of numerous wells, the government, on the 25th day of October, 1915, commenced the suits to recover both the lands and the value of the oil extracted, to quiet its title to the property, and also prayed for an injunction and the appointment of a receiver in each of the suits. A receiver having been appointed in each of them, the present appeals were taken from those orders.

Concerning the material facts, there seems to be no dispute; the differences between the parties involving only questions of law. Government lands, containing petroleum or other mineral oils, and that are chiefly valuable therefor, not withdrawn or otherwise reserved, may be entered and patented, and, indeed, only can be entered and patented, under the provisions of the laws relating to placer mining claims. 29 Stat. 526 (Comp. St. 1916, § 4635). It appears from the records that the predecessors in interest of the appellants located these lands, as also the other portions of the said section, under and by virtue of the laws governing placer claims.

Section 2329 of the Revised Statutes provides as follows:

"Claims usually called 'placers,' including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; but where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands."

Section 2331 of the same statutes, so far as pertinent, is as follows:

"Where placer claims are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required, and all placer mining claims located after the tenth day of May, eighteen hundred and seventy-two, shall conform as near as practicable with the United States system of public land surveys, and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each individual claimant."

The provisions regarding veins and lodes are contained in sections 2320, 2322, 2323, and 2324 of the Revised Statutes (Comp. St. 1916 §§ 4615, 4618, 4619, 4620), and they include the requirement that the location must be distinctly marked on the ground so that the boundaries can be readily traced, and that a discovery of mineral be made within such boundaries. A location made by an association of persons, as said by Mr. Justice Henshaw, speaking for the Supreme Court of California in the case of Miller v. Chrisman, 140 Cal. 440, 449, 73 Pac. 1083, 1085 (98 Am. St. Rep. 63)—

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"by the very terms of the law, is one location covering 160 acres, and not eight locations, each covering 20 acres. The boundaries required to be marked are the boundaries of the 160 acres, and not the boundaries of each separate 20 acres. The expenditure of $500 before patent issues is an expenditure required upon the whole land, and not an expenditure upon the 20-acre subdivisions thereof, and the only assessment work required is labor to the value of $100 upon the single location, and not upon any 20-acre subdivision thereof. Logically, therefore, since in marking boundaries, doing assessment work, and expenditure for patent the 160 acres are treated as an entirety under one location, for the purpose of discovery it should be treated in the same manner; and this is the ruling, with some conflict in its earlier decisions, which the Land Office of the United States has finally returned to and settled upon. In the case of Union Oil Co., 25 L. D. 351, it is explicitly declared: 'A placer location, if made by an association of persons, may include as much as 160 acres. It is nevertheless a single location, and as such only a single discovery is by the statute required to support it.' With this declaration we are in full accord."

Nor has Congress so far fixed any limit to the number of locations that may be made by the same person or persons—its policy having always been to encourage the exploration of the public lands and the discovery and development of such minerals as may be found in them. And it has long been the established law respecting such claims that, where two or more contiguous ones are held by the same person or persons, work done in good faith upon any one of them, or outside of the boundaries of either of them, which directly tends to the development or benefit of all of the claims for mining purposes, should be held applicable to each and all of such claims. Anvil Hydraulic & Drainage Co. v. Code, 182 Fed. 205, 105 C. C. A. 45, decided by this court, where will be found cited many cases to the same effect.

But, as respects oil mining claims, Congress, by act approved February 12, 1903 (32 Stat. 825), limited the number of a group of claims on which the annual assessment work might be done on one of the group for the benefit of the whole group in these words:

"That where oil lands are located under the provisions of title thirty-two, chapter six, Revised Statutes of the United States, as placer mining claims, the annual assessment labor upon such claims may be done upon any one of a group of claims lying contiguous and owned by the same person or corporation, not exceeding five claims in all: Provided, that said labor will tend to the development or to determine the oil-bearing character of such contiguous claims."

In this connection reference may be made to the decision of the writer in the case of Gird v. California Oil Co. (C. C.) 60 Fed. 531, which case is cited and relied on in support of the contention of the government in the present cases. The inapplicability of that case to the present ones will clearly appear from the statement that the Whale Oil claim was there sought to be held by reason of work claimed to have been done on others of a group of 80 claims, and from this extract from the opinion of the court in that case (60 Fed. 542):

"In the case at bar, none of the work done or expenditures made by the lessees of the plaintiffs, relied on to sustain the claim to the Whale Oil, were done or made on any claim contiguous to it. It is true that the evidence shows that, prior to the making of the leases in 1886 and 1887, Udall from time to time, under and pursuant to the local rules of the district, did considerable work in building roads in the district, and on the road that led in

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the direction of the Whale Oil claim. But the local rules, in so far as they conflict with the act of Congress, are of course, of no avail, and that, as has been repeatedly stated, requires an annual expenditure of $100 in work or improvements on each claim, provided that, where the claims are held in common, such expenditure may be made upon any one claim. But, to come within this latter provision, the claims so held in common must, as said by the Supreme Court in Chambers v. Harrington [111 U. S. 350, 4 Sup. Ct. 428, 28 L. Ed. 452], be contiguous, and the labor and improvements relied on must, as held in Smelting Co. v. Kemp, 104 U. S. at page 655 [26 L. Ed. 875], be made for the development of the claim to which it is sought to apply them; that is in the language of the Supreme Court, 'to facilitate the extraction of the minerals it may contain.' This, I think, cannot be justly affirmed of any part of the large expenditures shown to have been made by the lessees of the plaintiffs in the development of some of the claims embraced by the leases, all of which are remote from, and none contiguous to, the Whale Oil. I have not overlooked the contention of plaintiffs' counsel that by the well the lessees of the plaintiffs commenced on the Kenyon claim they hoped and expected, in years to come, to draw the oil from the Whale Oil claim, which is distant from the Kenyon considerably more than a mile, and between which and the Kenyon is a mountain range. The time when this result might be reached was fixed by the plaintiffs' witness who advanced the theory at from 10 to 100 years. When to this is added the fact that the well that was thus expected to extract the oil from the Whale Oil claim was not commenced until 1891, which was after the location of the Razzle Dazzle claim, upon which the defendant relies, nothing more need be said to show that work upon the well upon the Kenyon claim cannot be counted to maintain the validity of the Whale Oil location."

It is also the well-established law that in the absence of any intervening bona fide rights—and there are none in either of the present cases—the order in which the statutory requirements concerning the making of the locations are complied with is immaterial; that the marking of the boundaries of a claim may precede the discovery, or the discovery may precede the marking, and, if both are complete before the rights of others intervene, the earlier act will inure to the benefit of the locator as of the date of the later, and a complete possessory title to the premises will vest in him as of the later date. Erhardt v. Boaro, 113 U. S. 527, 5 Sup. Ct. 560, 28 L. Ed. 1113; Nevada Sierra Oil Co. v. Home Oil Co. (C. C.) 98 Fed. 673; Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C.) 11 Fed. 666; North Noonday Min. Co. v. Orient Min. Co. (C. C.) 1 Fed. 522; Zollars v. Evans (C. C.) 5 Fed. 172; Strepey v. Stark, 7 Colo. 614, 5 Pac. 111; Thompson v. Spray, 72 Cal. 528, 14 Pac. 182.

Passing for the present any consideration of the act of Congress of June 25, 1910, known as the "Pickett Act" (36 Stat. 847), it is entirely true that until discovery the locator can acquire no right as against the government; but it is well settled that, while in the bona fide effort to make such discovery, the ground that he has marked in accordance with the provisions of the statute, and of which he is in the actual possession, will be protected by the courts against any forcible, fraudulent, surreptitious, or clandestine entry by any third party, although it is open to the entry of others by any legal means for the purpose of locating it under the mining laws. Sparks v. Pierce, 115 U. S. 408, 413, 6 Sup. Ct. 102, 29 L. Ed. 428; Belk v. Meagher, 104 U. S. 279, 287, 26 L. Ed. 735; Olive Land & Development Co. v. Olmstead (C. C.) 103 Fed. 568, 573; Cosmos Exploration Co. v.

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Gray Eagle Oil Co., 112 Fed. 4, 14, 50 C. C. A. 79, 61 L. R. A. 230; Rooney et al. v. Barnette et al., 200 Fed. 700, 119 C. C. A. 116; Garthe v. Hart, 73 Cal. 541, 15 Pac. 93; Horswell v. Ruiz, 67 Cal. 111, 7 Pac. 197; Miller v. Chrisman, 140 Cal. 440, 447, 73 Pac. 1083, 74 Pac. 444, 98 Am. St. Rep. 63; Smith v. Union Oil Co., 166 Cal. 217, 224, 135 Pac. 966; McCormick v. Varnes, 2 Utah, 355; Hopkins v. Noyes, 4 Mont. 550, 2 Pac. 280.

That right of possession against all intruders this court in the case of Rooney v. Barnette, supra, expressly held is a right that the possessor can convey to another, as did the Supreme Court of California in Miller v. Chrisman, supra, and as have many other courts. The rights thus possessed by the locator to maintain his possession against intruders while in good faith seeking to discover minerals within the boundaries of his claim, and to convey such possession before discovery, are, as said in Miller v. Chrisman, rights of value. After discovery they manifestly become binding upon the government, and protected by the Constitution. While it is possible that at times oil may be found issuing from the surface of the ground (in which case discovery, of course, may be made without difficulty or expense), it is matter of common knowledge that almost always drilling is essential to such discovery, and in many sections—particularly in the region where the lands in question are situate—drilling to great depth, involving heavy costs.

The records show that the lands here involved are situate in an arid region, where water at the times in question was obtained with great difficulty and at heavy cost, and that drilling without some water was impossible; that in such circumstances the appellant McLeod, on the 25th day of June, 1909, leased upon a royalty basis to a corporation called Mays Oil Company, afterwards known as Mays Consolidated Oil Company, the south half of the northwest quarter, the north half of the southwest quarter, the northeast quarter, and the southeast quarter of the said section 28, under which lease the lessee entered into the immediate and exclusive possession of those tracts of land. The lease (subsequently acquired by the appellant Consolidated Mutual Oil Company) provided for the drilling of wells upon each of the quarter sections embraced by the lease, in the effort to discover and take oil therefrom, for continuous and diligent work by the lessee to that end, and for the working of all of the said claims as a unit. And it was shown in each case, upon the application for the appointment of a receiver, that during the brief period that intervened between the execution of the lease and the making by President Taft of the proclamation of September 27, 1909, entitled "Temporary Petroleum Withdrawal No. 3," the lessee built a two-inch pipe line more than three miles in length to connect with the main of a water company called Stratton Water Company, constructed a standard derrick on each of the claims, built on the northeast quarter of the section a water tank with pipe line connections, a bunkhouse and a cookhouse, containing a dining room sufficient for the seating of 40 men, a kitchen, and bedroom; on the northwest quarter of the section it built another bunkhouse 20x30 feet in size; and on the southeast quarter it built a stabling yard for its

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freight teams and for a buggy and horses—in addition to which it built a boiler house and erected machinery for operating one full string of tools for drilling at the derrick on the southwest quarter of the section.

It further appears that, not only did the said lessee have, on the day of the issuance of the President's proclamation, the undisputed possession of all of the property covered by the lease, but was then actually drilling a well by means of the derrick on the southwest quarter of the section, having commenced to do so the preceding month, and which well was then about 830 feet in depth. Moreover, it is shown without conflict that the lessee had abundant means to carry out its undertaking, and but for the impossibility of securing the necessary water would have been sinking at each of the derricks on the other quarters of the section; that it intended and had directed the successive sinking of the other wells as soon as oil should be struck in the first one, and was so intent on the speeding of the work as to offer and pay a bonus to its employés for extra work.

It is not contended that the land in question was not subject to location under the mining laws by the predecessors in interest of the appellant McLeod, nor that the boundaries of the respective claims were not properly marked on the ground, nor that there was any intrusion upon the actual possession of the appellants or upon that of their predecessors in interest. Up to the time of the proclamation by the President, however, there had been no discovery of oil or any other mineral on any of the land, and consequently at that time the government was at liberty to at once withdraw it from any sort of disposition, either through act of the Congress or by order of the President, as was adjudged by the Supreme Court in the case of United States v. Midwest Oil Co., 236 U. S. 459, 35 Sup. Ct. 309, 59 L. Ed. 673—three of the Justices dissenting.

In pursuance of the power vested in him, President Taft on September 27, 1909, issued this proclamation:

"Temporary Petroleum Withdrawal No. 5.

"In aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain, all public lands in the accompanying lists are hereby temporarily withdrawn from all forms of location, settlement, selection, filing, entry, or disposal under the mineral or nonmineral public land laws. All locations or claims existing and valid on this date may proceed to entry in the usual manner after field investigation and examination."

It is insisted on behalf of the government that the exemptions from the effect of the order of the President therein provided for cannot be properly held to apply to any land upon which at the time of its promulgation no mineral had been discovered, even though, as in the present cases, the land had been located under and by virtue of the mining laws, its boundaries properly marked on the ground, and the assignees of the locators then in its bona fide actual possession, actively engaged in seeking mineral therein.

A discovery of mineral in the ground under such conditions would manifestly have perfected the locations, not only against third parties, but also against the government, and would have given to the owner of them an equitable title against the United States, and have entitled the

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owner to the legal title upon compliance with the statutory requirements respecting annual assessment work and payment, which rights would have been secure under the provisions of the Constitution of the United States. Such locations upon which discovery had then been made needed no protection through any order of the President. Said the Supreme Court in Belk v. Meagher, 104 U. S. 279, 283 (26 L. Ed. 736):

"A mining claim perfected under the law is property in the highest sense of that term, which may be bought, sold, and conveyed, and will pass by descent."

It is not, therefore, added the same court in Sullivan v. Iron Silver Mining Co., 143 U. S. 431, 434, 12 Sup. Ct. 555, 36 L. Ed. 214, "subject to the disposal of the government."

President Taft, who had himself been a distinguished federal judge, of course well knew this, and we think it altogether unreasonable to hold that the words employed by him in his order, "All locations or claims existing and valid on this date may proceed to entry in the usual manner after field investigation and examination," were intended, or can be fairly construed, to apply to lands upon which discovery had already been made and to which its locators had already acquired an equitable title, but, on the contrary, that they were intended, and should be held, to apply to all locations and claims existing at the time of the making of the withdrawal order to which the locators or claimants had some valid right. See United States v. Winona & St. P. R. Co., 165 U. S. 463, 478, 479, 17 Sup. Ct. 368, 41 L. Ed. 789.

That the appellants then had in the lands here in question valuable rights of possession and conveyance, which the courts of the country would protect and enforce, and consequently valid rights, has already been shown—rights, too, acquired by the license, if not by the invitation, of the government, and in the pursuance of which the lessee of this property had then, according to the records, already expended more than $20,000, and which land it continued to diligently explore and develop at very large additional expense for years, without objection by the government or by any third party so far as appears. And by its act of June 25, 1910 (36 Stat. 847), entitled "An act to authorize the President of the United States to make withdrawals of public lands in certain cases," Congress expressly declared:

"That the rights of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a bona fide occupant or claimant of oil or gas bearing lands, and who, at such date, is in diligent prosecution of work leading to discovery of oil or gas, shall not be affected or impaired by such order, so long as such occupant or claimant shall continue in diligent prosecution of said work."

This was the first legislative recognition ever made by Congress of any right on the part of an occupant or claimant of oil bearing lands prior to the discovery of oil thereon. By that act, which was obviously a remedial statute, and therefore to be liberally construed to effect its object, Congress expressly gave to the good-faith occupant or claimant of either oil or gas bearing lands, who, at the date of the act, was "in diligent prosecution of work leading to discovery of oil or gas," a status. That the appellants were at the time of the passage of the act in the actual and exclusive possession of the lands here in controversy and in diligent prosecution of work on one of two contiguous claims for

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the benefit of both, as well as other contiguous ones, in the effort to discover oil thereon, which continuous work resulted in the discovery of oil in each of the quarter sections here involved in large quantities, is clearly shown, and that the appellants continued from the date of the passage of the said act "in diligent prosecution of said work" is undisputed. We therefore regard it as clear that the appellants also come within the express provisions of the act of June 25, 1910.

In deciding adversely a much stronger case for the government than are the present ones, the Circuit Court of Appeals of the Eighth Circuit, in the recent case of United States v. Grass Creek Oil & Gas Co. and Ohio Oil Co., 236 Fed. 481, 487, 149 C. C. A. 533, 539, in speaking of the act of June 25, 1910, said:

"It is claimed that actual drilling operations were not commenced until July 1, 1914, on the northwest quarter, and on July 31, 1914, on the east half of the southwest quarter, and that until the actual drilling was begun there was no prosecution of work within the meaning of the act of Congress. We are of the opinion that this is too narrow a view to take of this statute. The enactment of this proviso by Congress could have had but one object in view, and that was to protect the rights of all persons who, at the date of an order of withdrawal, are occupying or claiming oil-bearing lands in good faith, for the purpose of acquiring them under the laws of the United States, and are diligently prosecuting the work leading to the discovery of oil. Before the enactment of this statute discovery of the mineral was essential to make a location. As frequently—in fact, in most instances—prospecting was necessary in order to determine whether oil or gas are on the public lands, and large sums of money were necessarily expended to ascertain this fact, Congress by this proviso in the act of 1910 extended its protecting arm to those acting in good faith in an effort to ascertain whether there was oil or gas under them. In our opinion, when a citizen of the United States in good faith enters upon public land for the purpose of discovering oil or gas, takes possession of the land by placing a caretaker thereon while he is taking proper steps to obtain the material necessary for the work of constructing the camps, enters into contracts for drilling, acting as expeditiously as possible in erecting camps and preparing for the drilling, spends money and enters into contracts whereby he becomes liable for sums of money to prosecute the work leading to the discovery of oil or gas, and as soon as it is possible, by the exercise of proper diligence, begins the work of drilling, and continues it diligently and expeditiously until oil is discovered in commercial quantities, he is within the protection of this proviso."

The facts in the cases of United States v. Midway Northern Oil Co. (D. C.) 232 Fed. 619, were very different from those in the present cases, as will clearly appear from this excerpt from the opinion of the learned judge who decided them:

"No discovery of oil had been made on any of the lands at the date of the first withdrawal order, nor was any one in possession thereof at that time actually engaged in work looking to a discovery. In suits 47, A-2, A-3, and A-30 sundry parties had, prior thereto, posted on the land involved in each of the suits and caused to be recorded a notice claiming a location of the land as a petroleum placer mining claim under the mining laws of the United States; but no discovery of oil had been made or any work done thereon, except some so-called assessment work, which consisted in excavating sump holes, building small cabins, and the erection of a couple of derricks on one of the tracts, which derricks were never used or equipped for drilling, but were subsequently taken down and removed to other parts of the premises. After the first withdrawal order, parties claiming as lessees of the so-called locators in the four cases referred to, and in the other two without any previous notice of location, commenced drilling operations in each of the tracts

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involved in the fall of 1909 or early in 1910, and continued thereafter until the discovery of oil, which they were extracting and disposing of when these suits were commenced against the parties in possession, the so-called locators, the purchasers of the oil, and others."

Moreover, Congress by its act of March 2, 1911 (36 Stat. 1015, c. 201 [Comp. St. 1916, § 4637]), gave statutory recognition of the right of transfer or assignment by the locator, under the mining laws, of any land containing oil or gas, to any qualified person, persons, or corporation "prior to discovery of oil or gas therein," provided "that such lands were not at the time of inception of development on or under such claim withdrawn from mineral entry."

But, over and above what has been said, the records show that upon due application to the Land Office of the United States the appellant McLeod was permitted to enter the lands here in question, for which he paid to the government $1,600, receiving therefor its register's final certificate of entry, issued October 31, 1914, which certificate it appears remains uncanceled, and concerning which the bills in these suits, filed as above stated October 25, 1915, are entirely silent. In speaking of a similar receipt issued to the Brick Company in the case of El Paso Brick Co. v. McKnight, 233 U. S. 257, 34 Sup. Ct. 498, 58 L. Ed. 943, L. R. A. 1915A, 1113, the Supreme Court said:

"The entry by the local land officer issuing the final receipt was in the nature of a judgment in rem (Wight v. Dubois [C. C.] 21 Fed. 693), and determined that the Brick Company's original locations were valid and that everything necessary to keep them in force, including the annual assessment work, had been done. It also adjudicated that no adverse claim existed and that the Brick Company was entitled to a patent. From that date, and until the entry was lawfully canceled, the Brick Company was in possession under an equitable title, and to be treated as 'though the patent had been delivered to' it. Dahl v. Raunheim, 132 U. S. 260, 262 [10 Sup. Ct. 74, 33 L. Ed. 324]. And, when McKnight instituted possessory proceedings against the Brick Company, the latter was entitled to a judgment in its favor when it produced that final receipt as proof that it was entitled to a patent and to the corresponding right of an owner."

Not only has no attack, so far as appears, been made by the government on the register's final certificate of entry, but there is in these cases not the slightest showing of any fraud or lack of good faith at any time on the part of the appellants or of any of their predecessors in interest. True, the bills of the government, which were verified by an agent upon information and belief, alleged that the location notices under which the appellants claim were posted by "mere dummies" to enable "defendant McLeod or some one else" to obtain the land; but that allegation was put in issue by positive denial under oath and there was no undertaking whatever to sustain the charge. Among the affidavits filed in opposition to the appointment of receivers was one made by the president of the appellant company, stating as facts the following, which were uncontradicted:

"That the said Consolidated Mutual Oil Company acquired and entered into possession of said properties in the month of February, 1914, and from that time forward this deponent has been the president of said corporation, and has had the active management of its affairs; that at the time that the Consolidated Mutual Oil Company took possession of said section 28, as aforesaid, there were situate on the said section six completed wells in which oil had

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been discovered in paying quantities, and there were two wells upon which drilling had been started, and which had been partially drilled; that since the said corporation acquired the said properties it has erected upon the said properties elaborate improvements and drilled three new wells, and has also proceeded with the drilling work that was in progress at the time that the said properties were acquired; that the said corporation has during the said period laid out and expended in improvements upon said property, and in drilling wells and in exploration and development work, a sum in excess of $150,000, and that the improvements now upon the said property are of a value in excess of $150,000; that the occupation of the said section 28 by the said corporation, and its predecessors in interest, were and have been at all times open, notorious, and were at all times actually known to the Land Department of the United States government, and that whatever activities in the way of development and improvement of the said property have taken place were with the full knowledge of the officers and agents of the Land Department of the United States; that during all of the said period of time the said corporation has given to the agents of the Land Department free access to its books and records of all kinds, and the said United States government has at all times during the said period had actual reports and knowledge of the improvements that the said corporation was making upon said property, and has had access to the books and papers of said corporation showing the amount of oil that it had extracted and was extracting, and showing the contractual obligations which said corporation was under in the matter of its equipment and the disposition of its oil supply; that during all of the said time the plaintiff, through its officers and agents of its Land Department, has had actual knowledge that the defendant Consolidated Mutual Oil Company was in possession of the said property under a claim of right, and it had during all of said period of time and until the filing of this suit stood by and knowingly permitted the said defendant corporation, without objection, to make the aforesaid expenditures of money, and to extract oils from said properties, and to incur obligations in and about the development of said property, and to develop the said property to its present condition, and to extract therefrom the very oil the value of which it is here seeking to recover; that deponent is informed and believes, and on such information and belief avers, that similarly with full knowledge of the facts concerning the location and possession and the work that had been done upon the said section 28 on and prior to the 27th day of September, 1909, plaintiff stood by and knowingly permitted the predecessors in interest of the said Consolidated Mutual Oil Company to remain in undisputed possession of the said premises and to expend, in work and labor tending to the development of oil on said property, upwards of $200,000; that the money so expended had been expended in large part in developing the identical wells upon the said property which were producing oil at the time that the said Consolidated Mutual Oil Company purchased the said property, and that the purchase of the said property by the said corporation was largely induced by the said developments; that because of the said development the said corporation has paid to its predecessors in interest more than $500,000."

In each case the order appealed from is reversed.

GILBERT, Circuit Judge (dissenting). In the first place, I think it is error to hold that the land in question was occupied under a location or claim "existing and valid" within the language of the exception found in the withdrawal order of September 27, 1909. The reasoning in United States v. McCutchen (D. C.) 234 Fed. 709, and United States v. Midway Northern Oil Co. (D. C.) 232 Fed. 619, is, I think, convincing.

In the second place, I think it extremely doubtful whether an association claim, such as that which is involved in the present case, is

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protected by the provisions of the Pickett Act of June 25, 1910, any further than that particular tract which may have been in the actual possession of a bona fide occupant or claimant, who, at the date of the withdrawal, was in the diligent prosecution of work leading to discovery of oil or gas. The notices of the location of the association claim involved in this case were filed in January, 1909. In June following the interests of all the persons who had filed the notices were transferred to McLeod. At that date no discovery had been made, and no work had been done. At the time of the withdrawal no work at all had been done on either of the quarter sections involved in these two suits, and no one was in diligent prosecution of work thereon leading to discovery of oil or gas. See United States v. Stockton Midway Oil Co. (D. C.) 240 Fed. 1010. An important distinction between these cases and the case of United States v. Grass Creek Oil & Gas Co., 236 Fed. 481, 149 C. C. A. 533, decided by the Circuit Court of Appeals for the Eighth Circuit, is that in the latter case, at the time of the withdrawal, all of the original locators of the association claim were in the actual possession by their lessee.

In the third place, the appeal presents the single question whether the court below, in appointing a receiver, abused the discretion which was vested in it. In Bosworth v. Terminal Rd. Ass'n, 174 U. S. 182, 186, 19 Sup. Ct. 625, 627 (43 L. Ed. 941), Judge Brewer said:

"But the appointment of a receiver is a matter resting largely in the discretion of the court—not, of course, an arbitrary, but a legal, discretion—and depending, not simply upon the breach of a condition in the mortgage, but also upon the question of relative injury and benefit to the parties and the public by the taking of the property out of the possession of the mortgagor, and placing it in the hands of a receiver."

In Hutchinson v. American Palace Car Co. (C. C.) 104 Fed. 182, 187, Judge Putnam said:

"The same principles apply with reference to the exercise of discretionary powers for the appointment of receivers as to the exercise of discretionary powers for preliminary injunctions."

In Briggs v. Neal, 120 Fed. 224, 56 C. C. A. 572, the Circuit Court of Appeals for the Fourth Circuit held that the appointment of a receiver is discretionary, and will not be reviewed, unless a gross abuse of discretion is shown. And all the authorities hold that the appointment of a receiver pendente lite, like the granting of an interlocutory injunction, is a matter resting, with certain limitations, within the discretion of the court to which the application is made, to be governed by a consideration of all the circumstances in the case. The courts have always recognized the propriety of appointing receivers in mining property, where the substance of the property in controversy may be wasted by the extraction of ores. In High on Receivers (3d Ed.) § 615, it is said:

"The aid of a receiver is sometimes granted in cases of mines or collieries pending a litigation which is to determine the title and rights of the parties, when, from the peculiar nature of the property, it is necessary that it should be kept in operation and preserved pendente lite."

In Elk Fork Oil & Gas Co. v. Foster, 99 Fed. 495, 39 C. C. A. 615, where the bill sought only an injunction, the Circuit Court of Appeals

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held that the District Court had the discretion on its own motion to appoint a receiver. The court quoted with approval from 15 Am. & Eng. Enc. of Law, 605, the following:

"Working of mines is something more than the common and ordinary use of real estate, and required the use of more than ordinary remedies to protect the rights of a party entitled to the possession. The granting of an injunction, and, if necessary, the appointment of a receiver, are common remedies."

The complaint in each of these cases involves a quarter section of land on which, at the time of the withdrawal, no well had been commenced. The complaint distinctly charged that the location of the association claim, purporting to have been filed in the names of Taylor, Powell, Darling, Pentz, Freeman, Thorne, Harder, and Searles, was in fact posted by and for the sole benefit of McLeod, and that the names of the locators were used to enable McLeod, or some other person than the locators, to acquire more than 20 acres of mineral land, in violation of the laws of the United States; that the said persons whose names were so used in said location notice were not bona fide locators, and each of them was without an interest in said location notice so filed, and their names were not used to enable them to secure said land, but that each was a mere dummy, used for the purposes alleged. The answers denied these allegations. The judge of the court below in his opinion stated that in his judgment the present status of the property in the cases should be maintained, either by enjoining the withdrawal of oil or by the appointment of a receiver, "until the right of defendants to withdraw oil from the land is finally determined, either by the Land Department or by the court. It seems to me that the appointment of a receiver will work less hardship to defendants than the granting of an injunction."

The defendants in their answers pleaded the provisions of the Pickett Act, and alleged that they had acquired the association claim by complying therewith. The burden of proof was upon them to prove that this was true. On the hearing of the application for the receiver, they presented affidavits tending to show that it was true. Was the court below bound to accept those affidavits as final and conclusive, and therefore deny the application for a receiver? I think not. Perhaps the members of this court would not have appointed a receiver upon the showing made, but that is not the question here. The question is whether the court below manifestly abused the discretion which was lodged in it. That court may have entertained the opinion of the meaning of the Pickett Act which I have outlined above. If it did, a clear case was made for the appointment of a receiver to prevent waste. It mav have been of the opinion that the showing made by the affidavits, made as they were by interested parties, was not sufficient to prove the diligence which the Pickett Act required. If so, the appointment of a receiver was not an abuse of discretion. Lands which have ceased to be public lands, by reason of the initiation of pre-emption and homestead and other claims, are still so far public lands that the United States may protect them from waste. Shiver v. United States, 159 U. S. 491, 16 Sup. Ct. 54, 40 L. Ed. 231.

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(245 Fed. 533)

NORTH AMERICAN OIL CONSOLIDATED et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. August 20, 1917. Rehearing Denied October 8, 1917.)

No. 2789.

Appeal from the District Court of the United States for the Southern Division of the Southern District of California; Maurice T. Dooling, Judge.

Suit in equity by the United States against the North American Oil Consolidated, Walter P. Frick, John F. Carlston, Clarence J. Berry, Dennis Searles, Walter H. Leimert, and Wickham Havens. Decree for complainant, and defendants appeal. Reversed.

See, also, Consolidated Mut. Oil Co. v. United States, 245 Fed. 521, 157 C. C. A. 633.

U. T. Clotfelter, of Los Angeles, Cal., and A. L. Weil, Charles S. Wheeler, and John F. Bowie, all of San Francisco, Cal., for appellants.

E. J. Justice, F. P. Hobgood, Jr., Frank Hall, Jas. W. Witten, and A. E. Campbell, Sp. Asst. Attys. Gen., all of San Francisco, Cal., and Albert Schoonover, U. S. Atty., of Los Angeles, Cal., for the United States.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

PER CURIAM. On the authority of Consolidated Mutual Oil Company, a Corporation, and J. M. McLeod, Appellants, v. United States of America, Appellee, No. 2787, and Consolidated Mutual Oil Company, a Corporation, and J. M. McLeod, Appellants, v. United States of America, Appellee, No. 2788, 245 Fed. 521, 157 C. C. A. 633, just decided, the order appealed from is reversed.

GILBERT, Circuit Judge, dissenting.

(245 Fed. 533)

UNITED STATES STEEL PRODUCTS CO. v. POOLE-DEAN CO.

(Circuit Court of Appeals, Ninth Circuit. October 1, 1917.)

No. 2936.

1. CONTRACTS ⟹186(2)—SUBCONTRACTORS—RIGHTS OF.

Defendant, the principal contractor, who subcontracted with plaintiff to do part of the work, cannot defeat plaintiff's action on the theory that plaintiff was doing the work for defendant's principal; plaintiff having no contractual relations with the principal.

2. CONTRACTS ⟹176(6, 7)—CONSTRUCTION—PROVINCE OF COURT AND JURY.

Where the entire contract was found in correspondence between the parties, the trial judge should construe the same; but, if the contract was partly written and partly parol, the question of its terms is for the jury.

3. CONTRACTS ⟹176(7)—CONSTRUCTION—QUESTION FOR JURY.

Where plaintiff entered into a subcontract with defendant, the principal contractor, to erect steel work for buildings and a dry dock composing a terminal of a railway company, and correspondence between the parties recited the price per ton to be paid for the erection, riveting, and painting of the steel work, but defendant's answer alleged that the contract was made on the express understanding that defendant should deliver the steel by water as completely fabricated as was its custom to ship by water transportation similar steel for similar work, and one of defendant's letters relating to the contract recited that a formal contract should be drawn up as soon as conditions would permit, the contract must be

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treated as partly written and partly parol, and hence the question of its terms is for the jury.

4. APPEAL AND ERROR ⟹1001(1)—REVIEW—VERDICT.
Where the evidence presented a question for the jury, and the instructions were correct, the verdict will not be disturbed on appeal.

In Error to the District Court of the United States for the District of Oregon; Charles E. Wolverton, Judge.

Action by the Poole-Dean Company, a corporation, against the United States Steel Products Company, a corporation, to recover damages for breach of contract for the erecting and painting of the steel work for the buildings and dry dock composing the terminal of the Grand Trunk Pacific Railway at Prince Rupert, British Columbia. Judgment for plaintiff. Defendant brings the present writ of error. Affirmed.

In 1912, plaintiff in error, a New Jersey corporation, obtained from the Grand Trunk Pacific Railway Company a contract to furnish and erect steel to be used in the latter's terminal buildings and floating dry dock at Prince Rupert, British Columbia. Not being entitled to operate in Canada, plaintiff in error sublet the erecting of the steel to defendant in error, an Oregon corporation. The latter agreement was never incorporated in a formal contract, but is evidenced by the following letters:

"November 16, 1912.

"U. S. Steel Products Co., Selling Building, Portland, Or.—Gentlemen: We propose to furnish all necessary labor and equipment to erect, rivet, and paint the structural steel to be used in buildings and smokestack for the Grand Trunk Pacific Railway at Prince Rupert, B. C., for the sum of eighteen ($18.00) dollars per ton of 2,000 lbs. Material to be delivered on docks at building sites.

"Yours very truly, Poole-Dean Company,
"Per Otho Poole."

"United States Steel Products Company, Pacific Coast Department.

"Portland, Oregon, March 24, 1913.

"Messrs. Poole-Dean Co., Portland, Oregon—Gentlemen: Referring to your conversation with our Mr. Overmire and the writer relative to your contract covering erection feature for the Grand Trunk Pacific Buildings at Prince Rupert, B. C., it is understood that we used your figures in connection with our proposal on this work, and consequently you will receive the order for doing this erection.

"As to the deliveries, wish to advise that our schedule contemplates commencing shipment from the plant in June and complete about the middle of September, but we undoubtedly will have to figure about four to four and one-half months from the time material leaves the plant until it reaches Prince Rupert.

"Our formal contract with you for the erection will be drawn up as soon as conditions permit.

"Trusting this letter will give you the necessary authority for making your arrangements for your part of the work, we remain,

"Very truly yours, Bridge and Structural Department,
"C. C. Overmire, Contracting Manager.
"By Frank E. Fey, Contracting Agent."

"November 7, 1913.

"U. S. Steel Products Co., City—Gentlemen: In looking through our files we find that we have misplaced copies of our original proposals on the main buildings and wings of the dry dock at Prince Rupert.

"It is our understanding we are to erect, rivet, and paint two coats on main buildings for $18.00 per ton of 2,000 lbs.; on wings of dry dock we are to

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erect, rivet, and caulk for $18.00 per ton of 2,000 lbs.; all material to be delivered to us on dock at building site.

"If the above is in accordance with your understanding, we will ask that you confirm same at your earliest convenience, in order that our records may be complete. Thanking you in advance, we are,

"Yours very truly, Poole-Dean Company,
"Per Otho Poole."

"United States Steel Products Company, Pacific Coast Department.

"Portland, Oregon, November 11, 1913.

"Subject: Prince Rupert Buildings.

"Messrs. Poole-Dean Co., Portland, Oregon—Gentlemen: We have your letter of the 7th instant, which states that you have misplaced copies of your original proposal on the buildings and wings of the dry dock on the above subject.

"Your understanding is, in accordance with ours, that you are to haul, erect, and rivet the steel for the buildings, for eighteen dollars ($18.00) per net ton of 2,000 lbs., which includes your furnishing and applying two coats of paint, as per specifications; also that you are to haul, erect, rivet, and caulk the steel work for the wings of the dry dock, for eighteen dollars ($18.00) per net ton of 2,000 lbs. All steel work to be delivered to you on dock at Prince Rupert, B. C.

"Very truly yours, Bridge and Structural Department,
"C. C. Overmire, Contracting Manager.

"By Frank E. Fey, Contracting Agent."

There is no dispute as to the accuracy of the above letters, nor as to their contents. On September 19, 1916, defendant in error filed its amended complaint, in the United States District Court for the District of Oregon, against plaintiff in error, alleging substantially as follows: That plaintiff entered into a contract with defendant to furnish the labor and equipment to erect, rivet, and paint the structural steel to be used in the terminal buildings of the Grand Trunk Pacific Railway Company at Prince Rupert, B. C., at an agreed price of $18 per ton, which price was based upon the understanding that the steel would be delivered completely fabricated, and that if extra work was necessary, other than for the erection of said steel, plaintiff would be allowed a reasonable amount for such extra work; that thereafter, when the erecting plans were received, plaintiff discovered that the steel would not be received at Prince Rupert completely fabricated, and thereupon notified defendant that plaintiff would charge defendant for the extra work required in fabricating the steel, and defendant, through its agent, Overmire, promised and agreed that said matter would be satisfactorily adjusted and instructed plaintiff to proceed with the work; that plaintiff fabricated and assembled the steel for the various buildings at an actual and reasonable expense of $3,330.69.

For a second cause of action it is alleged in the complaint that it was understood that the erecting under the above contract should begin when three pontoons had been floated in the dry docks of said terminal, and that defendant would not order plaintiff to begin work until such time as plaintiff could continuously keep at work until the completion of the job, and that defendant would reimburse plaintiff for any delays in the work; that it was further understood and agreed that defendant would furnish plaintiff with adequate space for the purpose of assorting and handling the structural steel when it was unloaded on the dock of the Grand Trunk Pacific Railway Company; that defendant thereafter instructed plaintiff to commence work, and plaintiff did commence work, upon the buildings, and completed the same before three pontoons of the dry docks had been floated; that because of the premature instructions, and the delays in the completing of said pontoons, plaintiff's equipment was compelled to lie idle and remain in disuse from September 1, 1914, to November 5, 1914; and that the reasonable rental of said equipment for said period of time was $2,123.64.

For a third cause of action it is alleged in the complaint that plaintiff was compelled to return the laborers who were employed upon the work at Prince

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Rupert, B. C., to Vancouver, B. C., and pay the railroad expenses and wages of the men while in transit, at a cost of $918, on account of the breach of the contract by defendant as set forth in the preceding paragraph.

For a fourth cause of action it is alleged that, notwithstanding it was provided in the contract above mentioned that defendant would furnish plaintiff with adequate space for the purpose of assorting and handling the structural steel when it was unloaded on the dock of the Grand Trunk Pacific Railway Company, defendant disregarded this understanding and agreement, in that it failed to provide adequate space for such purpose, necessitating plaintiff's using extra time and labor in assorting and handling the steel; the reasonable value of said extra time and labor being $2,459.

For a fifth cause of action it is alleged that plaintiff, at the special instance and request of the defendant, performed extra work during the months of April, May, June, and July, 1915, for which it was understood and agreed that defendant should pay, and which amounted in the aggregate to the sum of $400.70.

Wherefore plaintiff prayed judgment in the sum of $9,232.03.

Defendant answered, alleging that it was understood between plaintiff and defendant that the latter should deliver the steel to plaintiff by water transportation, and that said steel should be delivered as completely fabricated as it was defendant's custom to ship by water transportation similar steel for similar work, and that defendant did in fact deliver the steel as completely fabricated as it was defendant's custom when shipping by water transportation; that plaintiff's construction operations were conducted under the orders and instructions of the Grand Trunk Pacific Railway, and not under the orders and instructions of defendant; that the pontoons and space for storing mentioned in the complaint were to be furnished and provided by the Grand Trunk Pacific Railway and not by defendant, and that plaintiff's loss or damage mentioned in the second, third, and fourth causes of action was not occasioned by defendant; and that plaintiff's claim of $400.70 for extra work was duly allowed by the Grand Trunk Pacific Railway, and the amount thereof deducted from certain indebtedness due from plaintiff to the railway.

The case came on for trial before a jury, who thereafter returned a verdict in favor of the plaintiff for $7,000. Defendant alleges error in the admission of certain testimony over defendant's objection, in the giving of certain instructions, and in the refusal by the court to give certain other instructions requested by defendant.

Teal, Minor & Winfree and Rogers MacVeagh, all of Portland, Or., for plaintiff in error.

McDougal & McDougal, of Portland, Or., for defendant in error.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). [1] The defense that the work was done for the Grand Trunk Pacific Railway, and not for the defendant, cannot be sustained. The plaintiff had no contractual relations whatever with the Grand Trunk Pacific Railway. It is true the work was done under the terms of a subcontract provided for in an original contract between the defendant and the Grand Trunk Pacific Railway; but the contract in suit was between the plaintiff and defendant. This is expressly admitted in a number of paragraphs in defendant's answer, and particularly in paragraph 4, where it is alleged that:

"Plaintiff submitted to defendant written proposals for the performance of a part of said contract between defendant and Grand Trunk Pacific Railway, which proposals were accepted in writing by defendant, and said proposals and acceptance constituted and do now constitute the contract between plaintiff and defendant mentioned in plaintiff's said amended complaint."

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[2] The main question for this court to determine is whether or not the contract between the parties, and under which the work in question was done, was entirely in writing; that is, whether the four letters introduced in evidence and relied upon by the defendant contained the completed contract. If that question can be answered in the affirmative as a matter of law, then it was the duty of the trial judge to construe such contract; but, if it must be answered in the negative, it was within the province of the jury, and its duty, under proper instructions from the court, to determine what the contract was, not only from the writings introduced as setting forth the alleged agreement, but from all the evidence produced in connection with such writings and the subject-matter thereof. Etting v. United States Bank, 11 Wheat. (24 U. S.) 57, 75, 6 L. Ed. 419; Rankin v. Fidelity Ins. Trust & Savings Deposit Co., 189 U. S. 242, 252, 23 Sup. Ct. 553, 47 L. Ed. 792; American Bridge & Contract Co. v. Bullen Bridge Co., 29 Or. 549, 46 Pac. 138.

[3] That the contract was not entirely in writing we think is admitted by the defendant in its answer, wherein it states, in paragraph VII, that:

> "It was mutually understood and agreed by and between plaintiff and defendant, at the time said contract between plaintiff and defendant was entered into, and said contract between plaintiff and defendant was made upon the express understanding, that defendant should deliver said steel to plaintiff by water transportation, and that said steel should be delivered as completely fabricated as it was defendant's custom to ship by water transportation similar steel for similar work."

Again, in paragraph IX, allusion is made to the fact that "said contract between plaintiff and defendant was made with the express understanding" that certain conditions existed, while in paragraph X it is positively set forth as a defense that:

> "It was mutually understood and agreed by and between plaintiff and defendant, at the time said contract between plaintiff and defendant was entered into, and said contract between plaintiff and defendant was made with the express understanding, that the pontoons for the wing of the dry dock should be furnished and provided by Grand Trunk Pacific Railway, and not by defendant, and said pontoons are the pontoons mentioned in plaintiff's said amended complaint; and it was mutually understood and agreed by and between plaintiff and defendant, at the time said contract between plaintiff and defendant was entered into, and said contract between plaintiff and defendant was made with the express understanding, that space for storing, assorting, and handling said steel on the dock of Grand Trunk Pacific Railway at Prince Rupert, British Columbia, should be furnished and provided by Grand Trunk Pacific Railway, and not by defendant."

These allegations in themselves disclose the fact that the contract under which the work in question was done was not fully expressed by the writings, and that the court could not as matter of law exclude evidence of the oral agreements and mutual understanding of the parties upon which such writings were based, and in accordance with which said work was done; nor could the court decline to submit to the jury the question of what the real contract was between the parties, and whether the terms of that contract had been properly carried out. That the execution of a more formal instrument by the parties was contemplated is shown in a paragraph of one of the letters of the de-

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fendant set forth in the pleadings, where it is said that "our formal contract with you for the erection will be drawn up as soon as conditions permit." The testimony shows that the plaintiff tried repeatedly to have such an instrument prepared and executed, but defendant failed, for some reason not disclosed, to comply. Having had ample opportunity to reduce to writing the full details of their agreement, and failed to do so, the defendant is not now in a position to invoke the rule of law which prohibits the introduction of oral evidence to explain the meaning of a written instrument. That rule does not apply to the facts of this case, from any standpoint.

[4] The first, second, third, and fourth causes of action are based upon the agreement alleged by plaintiff to have been made, and the court having properly instructed the jury in regard thereto, the findings of the jury as to the facts will not be disturbed.

The fifth cause of action relates to the performance of extra work by the plaintiff at the alleged instance and request of the defendant, outside of the alleged contract, for which a charge is made of $400.70. The defendant admits that this work was done at its request, but alleges that the work was ordered at various times by the Grand Trunk Pacific Railway, and such orders merely transmitted by defendant to plaintiff; that after said work was completed plaintiff's claim of $400.70 therefor was presented by plaintiff to the said Grand Trunk Pacific Railway and duly allowed, and the amount thereof deducted from certain indebtedness due from plaintiff to said railway. Evidence was introduced upon this matter, and the question submitted to the jury under proper instructions from the court.

Finding no error in the instructions of the court below, the judgment is affirmed.

(245 Fed. 538)

JACOBSOHN v. LARKEY. GOLD v. SAME. In re AMERICAN BEAVER CO.

(Circuit Court of Appeals, Third Circuit. October 26, 1917.)

Nos. 2271, 2313.

1. BANKRUPTCY ⟹264—SALE OF PROPERTY—RIGHT TO OPPOSE CONFIRMATION.
The unsuccessful bidder at a sale of a bankrupt's real and personal property had no standing to oppose confirmation of the sale on the ground that he would have bid more than the highest bidders if the property had been sold as a whole, instead of separately, where the sale was made in conformity with the order therefor.

2. BANKRUPTCY ⟹264—SALE OF PROPERTY—RIGHT TO URGE CONFIRMATION.
The high bidders on a public sale of a bankrupt's property have a standing to appear and urge the acceptance of their bids and the confirmation of the sale, especially as public policy requires stability in judicial sales in order to induce bidding at such sales.

3. BANKRUPTCY ⟹269—SALE OF PROPERTY—GROUNDS FOR SETTING ASIDE.
A mere offer to pay more than the price bid is not a sufficient ground for setting aside a public sale of a bankrupt's property, especially as it would tend to discourage and prevent bidding to deprive the highest bidder of the advantage of his accepted bid because of a subsequent offer of another person to bid higher on a resale.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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4. BANKRUPTCY ⟹269—SALE OF PROPERTY—GROUNDS FOR SETTING ASIDE.
Mere inadequacy of price is not a sufficient ground for setting aside a public sale of a bankrupt's property; but when the inadequacy is so great as in itself to raise a presumption of fraud, or to shock the conscience of the court, it becomes gross inadequacy and is a sufficient ground.

5. BANKRUPTCY ⟹264—SALE OF PROPERTY—CONFIRMATION—DISCRETION.
Under Bankruptcy Act July 1, 1898, c. 541, § 70b, 30 Stat. 565 (Comp. St. 1916, § 9654), requiring the real and personal property of bankrupt estates to be appraised, and providing that property shall not be sold, otherwise than subject to the approval of the court, for less than 75 per cent. of its appraised value, whether the price bid on a public sale is grossly inadequate, and whether confirmation should be refused on that ground, are matters within the judgment and discretion of the tribunal ordering the sale.

6. BANKRUPTCY ⟹446—REVIEW OF PROCEEDINGS—DISCRETION OF COURT.
An appellate tribunal will not reverse the discretion of the bankruptcy court in approving or setting aside a public sale of a bankrupt's property, under Bankruptcy Act, § 70b, by substituting its own discretion; nor will it disturb or interfere with the exercise of such discretion, so long as it does not amount to an abuse of discretion.

7. BANKRUPTCY ⟹269—SALE OF PROPERTY—SETTING ASIDE—DISCRETION.
While the bankruptcy court would have exercised a discretion of doubtful validity in setting aside a sale of a bankrupt's real and personal property for $19,900 and $7,600, respectively, because an unsuccessful bidder offered to bid $1,500 more on a resale of the property as a whole, there was no improvident exercise of its discretion in setting aside the sale for gross inadequacy of price, where the personal property was appraised at $31,212.20 and the real property at $34,350, providing the appraisement was evidence upon which the court might properly base its discretion.

8. BANKRUPTCY ⟹269—SALE OF PROPERTY—SETTING ASIDE—DISCRETION.
Under Bankruptcy Act, § 70b, requiring the real and personal property of bankrupt estates to be appraised, and providing that it shall not be sold otherwise than subject to approval of the court for less than 75 per cent. of the appraised value, the appraisement was evidence upon which the court might act in setting aside a sale for gross inadequacy of price.

9. BANKRUPTCY ⟹269—SALE OF PROPERTY—SETTING ASIDE—CONDITIONS ON RESALE.
Where the bankruptcy court set aside a public sale of a bankrupt's property for gross inadequacy of price, and not because an unsuccessful bidder offered to bid more on a resale, there was nothing improper in conditioning its order for a resale on the giving of bonds by the objectors to insure a better bid on the resale.

Petition for Revision of Proceedings of the District Court of the United States for the District of New Jersey; J. Warren Davis, Judge.

In the matter of the American Beaver Company, bankrupt; Barney Larkey, trustee. An order of the referee, refusing confirmation of sales of the real and personal property of the bankrupt, was affirmed by the District Court (242 Fed. 599), and Lazar Jacobsohn and Herman Gold separately petition for review of the order so far as it affects the real and personal property, respectively. Affirmed.

Cecil H. MacMahon, of Newark, N. J., for petitioners.
Nathan Bilder, of Newark, N. J., for defendant.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

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WOOLLEY, Circuit Judge. The matter here involved was brought before the District Court on petition to review an order of a referee refusing confirmation of a sale in bankruptcy on the ground of gross inadequacy of price. The court affirmed the order. Its decision is now before us for review and revision. Bankruptcy Act, § 24b (Comp. St. 1916, § 9608).

Pursuant to an order of the referee, the trustee offered at public sale, subject to confirmation, the property of the bankrupt, consisting of real estate, machinery, equipment and merchandise theretofore used in the bankrupt's business of hat manufacturer. The real estate was encumbered by a first mortgage for $9,000 and by a second mortgage for $58,000 given to secure an issue of bonds. The latter mortgage purported to be a lien also upon the personal estate. Conceiving that the liens upon the two classes of property required that the property be sold separately in order to avoid confusion in the application of proceeds (the property being offered free of liens), the trustee declined to sell the property in bulk as a going concern, but sold it in separate parcels on different days.

The trustee reported that Lazar Jacobsohn had bid $19,900 for the realty and Herman Gold $7,600 for the personalty; that these were the highest bids; and recommended the confirmation of the sale.

Confirmation was opposed by Louis Kamm, an unsuccessful bidder, and by sundry unsecured creditors. Kamm's complaint was that he was forced to bid low because the property was offered in two parcels, realty and personalty; that he had no use for one without the other; that had the property been offered in bulk as a going concern he would have bid and was still ready to bid a sum larger than the aggregate of the highest bids received. The creditors' objection to confirmation was that the property was sold for a grossly inadequate price.

Upon the question of inadequacy of price no evidence was produced. The creditors cited the appraisement, and the referee, relying upon it as evidence of value, was manifestly influenced in his conclusion by the great disparity between the valuations there made and the prices bid. The personal property was appraised at $31,212.20 and was sold for $7,600; the real property was appraised at $34,350 and was sold for $19,900.

Notwithstanding this disparity, the referee was not inclined to let go the bids at the first sale without first making sure of equally good bids at a second. To meet this situation the objecting bidder proposed giving a bond to insure that at a second sale the property would bring $2,500 more than the amount brought at the first, and the objecting creditors similarly offered a bond that the amount obtained at the second sale would be at least $1,500 more than that obtained at the first, provided that the property, after being offered in parcels, be offered as a whole. These tenders were accepted by the referee, the sale set aside (conditioned upon filing the bonds) and another sale ordered. On review the District Court affirmed the order of the referee. This action of the court is the matter before us for revision.

The principal question, of course, is whether the trial court exer-

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cised a proper discretion in affirming the order setting aside the sale. But in this question are involved separate and conflicting rights of perhaps three classes of persons, (1) the low bidder, (2) the high bidders, and (3) creditors.

[1] We may lay aside any claim of right made by the low bidder to have the sale set aside in order to give him another chance to bid. There was no irregularity in the sale. He simply complains that he would have bid higher if the property had been offered in a different way. The trustee offered the property in conformity with the order of sale, and as there is nothing to show either in the order of sale or in the manner in which the trustee executed it that the low bidder was injuriously affected, he is without right to oppose confirmation. In re Burr, 217 Fed. 16, 19, 133 C. C. A. 126.

[2] The high bidders, however, have a standing which permits them to appear and urge the acceptance of their bids and the confirmation of the sale. They were brought to the sale by invitation of the court, and having done what the court asked them to do, they now have a right to ask the court to approve their acts.

Their right to be heard is based upon still another consideration. Judicial sales are an indispensable part of the machinery employed in administering bankrupt estates. Public policy requires stability in such sales. The Ruby (D. C.) 38 Fed. 622; In re Burr, 217 Fed. 16, 19, 133 C. C. A. 126. To induce bidding at such sales and reliance upon them, the purpose of the law is that they shall be final, Tewabic Mining Co. v. Mason, 145 U. S. 349, 356, 12 Sup. Ct. 887, 36 L. Ed. 732; they are not to be disturbed except for substantial reasons.

[3] After much experience in scrutinizing bidding at judicial sales, courts now uniformly hold that the mere offer to pay more than the price bid is not a substantial ground for setting aside a sale, recognizing that nothing will more certainly tend to discourage and prevent bidding than a judicial determination that the highest bidder may be deprived of the advantage of his accepted bid by an offer of another person, subsequently made, to bid higher on resale. Morrisse v. Inglis, 46 N. J. Eq. 306, 19 Atl. 16; In re Metallic Specialty Mfg. Co. (D. C.) 193 Fed. 300; In re Shapiro (D. C.) 154 Fed. 673.

While such are the rights of successful bidders and while the policy of the law favors them as against lower bidders who attempt to overthrow them, their rights, however, are not superior to the right of creditors not to be deprived of their security at prices which are grossly inadequate. Therefore the issue in this case is not between the low and the high bidders but is between the high bidders and creditors—parties with equal standing—and the issue is not whether the court exercised a valid discretion in ordering a second sale on a tender of a higher bid, but is whether it abused its discretion in setting aside the first sale on the ground that the bids were grossly inadequate.

[4] The rule is that mere inadequacy of price is not a sufficient ground for setting aside a judicial sale; but when the inadequacy is so great as in itself to raise a presumption of fraud or to shock the conscience of the court, it becomes gross inadequacy, and is a sufficient

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ground. In re Burr, 217 Fed. 16, 21, 133 C. C. A. 126; Cowen v. Stevens, 3 Har. (Del.) 494; Oldham v. Hossenger, 5 Houst. (Del.) 34; Broomall v. Reybold, 5 Houst. (Del.) 435; Roger v. Ocheltree, 4 Houst. (Del.) 452.

[5-7] When in a given case a price is grossly inadequate and when upon that ground confirmation should be refused, are matters within the judgment and discretion of the tribunal ordering the sale. When a trial tribunal orders a judicial sale subject to its confirmation under authority expressly requiring of it the exercise of discretion in approving or setting aside the sale (Bankruptcy Act, § 70b), an appellate tribunal will not reverse its discretion by substituting its own nor will it otherwise disturb or interfere with its exercise so long as it does not amount to an abuse of discretion. In re Shea, 126 Fed. 153, 61 C. C. A. 219. In the exercise of this discretion the trial court in this case found that the prices bid were grossly inadequate. It based its judgment, as we read the record, not on the difference between the bids made at the first sale and the bid offered to be made at a second, but upon the disparity between the prices bid and the property valuations made by the appraisement. Had the court refused confirmation of the sale upon a finding of an inadequate price, based upon the difference between the bids made and the bid proposed, it would have exercised a discretion of doubtful validity. Morrisse v. Inglis, supra; In re Metallic Specialty Mfg. Co., supra; In re Shapiro, supra. But having found gross inadequacy of price in the disparity between the bid and the appraisement, we cannot say that the discretion of the court was improvidently exercised—if based upon evidence. As nothing was before the court showing the value of the property except the appraisement, the remaining question is, whether the appraisement is evidence upon which the court may base a valid discretion.

[8] An appraisal in bankruptcy is an estimate of the value of the bankrupt estate made by three disinterested persons. The appraisers are officers of the court and are selected with an especial regard to their fitness to give an opinion upon the value of the particular property comprising the estate. In the case under consideration the kind of property appraised was a hat manufactory and merchandise. Two of the appraisers were men of long experience and high standing in that business. The appraisal, therefore, is the value data upon which the court subsequently acts in disposing of the bankrupt's property. To obtain such data the statute provides (section 70b) that "all real and personal property belonging to bankrupt estates shall be appraised." Certainly this means that the property shall be appraised before it is sold, and as it is provided in the same section that property "shall not be sold otherwise than subject to the approval of the court for less than seventy-five per centum of its appraised value," the statute connects the appraisal with the sale and plainly intends that the value of the property as appraised shall have a bearing upon and a relation to the price at which the court, in the exercise of its discretion, shall confirm or set aside the sale.

The sale in this case was made subject to confirmation, as shown by the terms of the order, and was conducted under authority of the

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provision which requires confirmation by the court when the property is sold for less than seventy-five per centum of its appraised value. As the provision conferring upon the court authority to confirm the sale declares that that authority shall be exercised when the price bid has a given relation to the value appraised, it is clear to us that the statute intends that the appraisement shall be employed by the court as a guide in the exercise of its discretion. When the purchase price approaches the appraised value it leads the judgment of the court in one direction; when the disparity between the purchase price and the appraised value is so great as to suggest fraud or to shock the conscience of the court, then it directs the court's judgment in another direction. The appraisal thus becomes evidence of value. It is not conclusive evidence, to be sure, nor does it speak absolute verity, but it is provided for the court's use and the court may rely upon it alone or may rely upon it partially, or may look beyond it to other evidence in ascertaining the real value, as in an exceptional instance where a sale was set aside on a bid equal to the appraisal and a second sale ordered on proof that the property was worth and would bring three times the appraised value. In re Shea, 126 Fed. 153, 61 C. C. A. 219.

We are of opinion that the appraisement is evidence upon which the court may base a valid discretion when called upon to confirm or set aside a trustee's sale.

[9] It is further contended in this case that the care exercised by the court to secure as good a bid at the second sale as was obtained at the first shows that the court's discretion was swayed, if not determined, not by the disparity between the bid obtained and the appraised value, but by the small difference between the bids made at the first sale and the bid offered to be made at a second. We are not of this view. Inadequacy of the price bid at the first sale, and the terms under which the first sale was set aside and a second sale ordered are matters separate and distinct. Having found gross inadequacy of the price bid at the first sale, the court might validly set aside that sale on that ground and at the same time make an order for a second sale conditioned upon terms that would secure to the estate whatever advantage it derived from the bids at the first sale. These terms are considerations which have to do with a new sale ordered and have no relation to the discretion exercised in setting aside the first sale.

The decree below is affirmed.

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(245 Fed. 544)

UNION PAC. R. CO. v. LAUGHLIN (two cases).

(Circuit Court of Appeals, Eighth Circuit. August 20, 1917.)

Nos. 4730, 4731.

APPEAL AND ERROR ⟹1008(2)—REVIEW—ACTION TRIED TO COURT.

A general finding by the court in an action at law, in which a jury was waived by stipulation pursuant to Rev. St. § 649 (Comp. St. 1916, § 1587), is conclusive upon all questions of fact, and the judgment thereon is reviewable only for errors of law committed during the trial and to which exception was duly reserved.

Appeal from the District Court of the United States for the Western District of Missouri; Arba S. Van Valkenburgh, Judge.

In Error to the District Court of the United States for the Western District of Missouri; Arba S. Van Valkenburgh, Judge.

Action at law by one Bisbiroulis against the Union Pacific Railroad Company. From a judgment in favor of L. A. Laughlin, petitioner, defendant brings error. Appeal dismissed.

R. E. Watson, of Kansas City, Mo. (R. W. Blair, of Topeka, Kan., and Watson, Gage & Watson, of Kansas City, Mo., on the brief), for appellant and plaintiff in error.

C. R. Pence, of Kansas City, Mo., for appellee and defendant in error.

Before SANBORN and HOOK, Circuit Judges, and AMIDON, District Judge.

AMIDON, District Judge. A Greek by the name of Bisbiroulis was employed by an employment agency at Kansas City as one of a gang of laborers to work for the defendant, the Union Pacific Railroad Company. After some months of employment he was set to work upon a new cut-off line from Hastings to Gibbon, Neb. This line was being built by a subordinate company, known as the Hastings & Northwestern Railroad Company. That corporation, however, was simply an agency of the Union Pacific for building the line. Its officers were all officers of the Union Pacific, with the exception of the treasurer. While thus employed, Bisbiroulis met with an accident by a rail falling upon his leg, crushing it so as to require amputation. By a written power of attorney he employed L. A. Laughlin, the defendant in error (petitioner below), to prosecute his claim for damages against the Union Pacific Railroad Company. The present action was brought for that purpose in the state court at Kansas City, Mo., and removed by the defendant into the federal court. Thereafter a settlement was effected with the plaintiff, without the knowledge of his attorney, by claim agents in the employ of the Union Pacific, for the sum of $1,700. This settlement was made in the name of the Hastings & Northwestern Railroad Company, and the draft for $1,700 was on the treasurer of that company, but the voucher accompanying it is approved by the auditor of the Union Pacific Company. The release signed by Bisbiroulis in person contains this language:

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"Received of Hastings & Northwestern Railroad Company $1,700 in full settlement and complete satisfaction of all claims and causes of action against it growing out of any matter whatsoever, and particularly in full settlement and complete satisfaction of all claims or causes of action, that exist or may hereafter accrue, against it *or any other company*, * * * for damages for any and all personal injuries, or loss or damage to property sustained in or growing out of a certain accident. * * * Said accident occurred on the 7th day of March, 1913, at or near Gibbon, Nebraska, and consisted in being injured while employed as a laborer in extra gang No. 4."

This release clearly identified the cause of action upon which the suit against the Union Pacific was based. The attorneys for that company presented the release in court and asked for a dismissal of the action.

Going back now for a moment to the power of attorney signed by Bisbiroulis employing Laughlin, it contains the following language:

"As compensation for his services I agree to give said attorney 50 per cent. of whatever he obtained in settlement of my said claim either by suit or compromise. And in case I shall settle or compromise otherwise than through said attorney, he shall be entitled to a fee equal in amount to that received by me."

In response to the motion to dismiss, Laughlin filed a petition in court alleging that the settlement had been made fraudulently in the name of the Hastings & Northwestern Railroad Company for the purpose of defrauding him out of his fees as attorney, and that the Hastings & Northwestern Railroad Company was a subsidiary corporation of the defendant having the same officers, and that that company acted in collusion with the defendant in effecting the settlement on its behalf for the above-mentioned fraudulent purpose. He prayed a judgment against the Union Pacific Railroad Company for $1,700. The defendant filed an answer containing a general denial, and further alleging that Bisbiroulis was at the time of his injuries working for the Hastings & Northwestern Railroad Company, and that that company compromised and settled the claim for $1,700, and alleging that Bisbiroulis' injuries occurred in Nebraska, and that the settlement was made there, and that the law of that state as to the settlement and attorney's fees ought to control, and prayed that Laughlin's complaint be dismissed. The issue thus formed presents the only controversy that was before the trial court.

A stipulation in writing was filed waiving a jury. Evidence was introduced by Laughlin in support of his petition. At its conclusion defendant demurred to the evidence and excepted to the order of the court overruling the demurrer. The defendant then offered evidence on its own behalf, which upon elementary principles amounted to a waiver of the exception just taken. At the conclusion of the entire evidence the demurrer was not renewed, nor was any motion or request for findings of fact or declarations of law made, which would afford a basis for the errors that have been assigned in this court. The cause was submitted. The court made a general finding of the issues in favor of Laughlin, and entered a judgment at law in his behalf for $850. The railroad company has not only sued out a writ of error to review that judgment, but has also taken an appeal for the same purpose. Clearly the appeal should be dismissed. The proceeding was

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purely legal, and the judgment was also of that character. Under some circumstances the right and suit would be equitable; but upon the pleadings and evidence shown by this record it was legal, for the enforcement of a purely pecuniary liability.

The general finding by the court is conclusive upon all questions of fact. The bill of exceptions contains no errors of law in the course of the trial to support the errors that have been assigned here. Upon principles that have been asserted so frequently by this court as not to require discussion, the judgment must therefore be affirmed. Mason v. United States, 219 Fed. 547, 135 C. C. A. 315; Wear v. Imperial Window Glass Co., 224 Fed. 60, 139 C. C. A. 622.

The appeal is dismissed.

(245 Fed. 546)

MOISE v. SCHEIBEL et al.

In re OMAHA MOTOR CAR CO.

(Circuit Court of Appeals, Eighth Circuit. July 11, 1917.)

No. 4666.

1. BANKRUPTCY ⟹359—PROVABLE CLAIMS—CONDITIONAL ALLOWANCE.
That a stockholder and creditor of a bankrupt had orally promised another creditor of the same class that its claim should be paid does not estop the former from receiving dividends equally with the latter.

2. BANKRUPTCY ⟹341—PROVABLE CLAIMS—CONDITIONAL ALLOWANCE.
A creditor of a bankrupt corporation, who is also the holder of unpaid stock, cannot properly be required, as a condition to the allowance of his claim, to pay the amount due on his stock subscription, where the assessment against unpaid stock necessary to pay the claims of creditors has not been judicially ascertained.

Appeal from the District Court of the United States for the District of Nebraska; Thos. C. Munger, Judge.

In the matter of the Omaha Motor Car Company, bankrupt. From an order allowing the claim of Minnie Moise, as administratrix of Walter Moise, deceased, conditionally, on objection of L. W. Scheibel, trustee, and the Omaha Auto Top Company, another creditor, claimant appeals. Modified and affirmed.

F. S. Howell and J. E. Von Dorn, both of Omaha, Neb. (Isidor Ziegler, of Omaha, Neb., on the brief), for appellant.

Sidney W. Smith, of Omaha, Neb. (McGilton, Gaines & Smith, of Omaha, Neb., on the brief), for appellee.

Before HOOK, SMITH, and CARLAND, Circuit Judges.

CARLAND, Circuit Judge. Walter Moise filed claims aggregating $31,635.76 against the estate of the Omaha Motor Car Company, a bankrupt. Objections were filed to the allowance of the claims by the trustee in bankruptcy, and also by the Omaha Auto Top Company, a creditor of the bankrupt. After a hearing, the referee found a balance due to Moise of $1,615.05, but disallowed the same, for the reason, among others, that Moise was the subscriber and owner of 25

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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shares of the common and 50 shares of the preferred stock of the bankrupt, of the par value of $7,500, for which he had paid nothing. On petition for review the matter was certified to the District Court. That tribunal restated the account between Moise and the bankrupt, and found a balance due the former of $13,728.58, but disallowed this amount unless Moise should first pay to the estate of the bankrupt $7,500, with interest at 7 per cent. from April 12, 1912, as payment for the stock above mentioned. It was further ordered that, if such payment should be made, then the claim of Moise as found by the court should stand allowed, and that Moise should receive dividends upon his claim equally with all other creditors of the same class, except that the claim of the Omaha Auto Top Company should be preferred to that of Moise, and that any dividends that Moise should be entitled to should be paid to the Auto Top Company until its claim should be paid in full; otherwise, the findings of the referee were affirmed. From this order Moise appealed to this court.

The assignment of errors as printed in the record contains the following:

"9. That the court erred in finding and adjudging that the total net claim that should be allowed this creditor is only $13,728.58 (No. 9 hereof withdrawn from further consideration—See Præcipe filed Jan. 11, 1916.)"

Turning to page 41 of the record, we find that the præcipe for transcript filed by appellant directs assignment of error No. 9 to be omitted. We therefore have no occasion to review the correctness of the balance found due to Moise by the court, except as to the items known as the Colby note, the Burmeister note, the Stangl note, and the automobile item, as the charging of these items to Moise are separately assigned as error.

It is further assigned as error that the court erred in finding that Moise was a subscriber to the stock of the bankrupt in the sum of $7,500, par value. The referee and the District Court both found that Moise was a subscriber to the stock of the bankrupt in the above amount, and that he had not paid for the same. A careful review of the evidence has satisfied us that this finding is correct. We are also satisfied that the court did not err in charging the amount of the notes above mentioned to Moise, or the price of the automobile.

[1] We, however, think the court erred in granting a preference to the claim of the Auto Top Company over that of Moise. They were creditors of the same class, and the evidence does not warrant the establishment of what practically amounts to a lien on the dividends payable to Moise, in favor of the Auto Top Company. The evidence tends to show that Moise promised orally that the indebterness of the Auto Top Company should be paid; but there is no evidence of facts which would create an estoppel on the part of Moise from receiving his dividends on an equality with the Auto Top Company.

[2] We are also of the opinion that the court erred in deciding that Moise was not entitled to dividends until he had paid the full par value of his stock. It is true that unpaid stock subscriptions pass to the trustee (Loveland, p. 809, § 309), and that the corporate stock of

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an insolvent corporation is a trust fund for the benefit of creditors (Upton v. Tribilcock, 91 U. S. 45, 23 L. Ed. 203; Sanger v. Upton, 91 U. S. 56, 23 L. Ed. 220; Pullman v. Upton, 96 U. S. 328, 24 L. Ed. 818; Hawkins v. Glenn, 131 U. S. 319, 9 Sup. Ct. 739, 33 L. Ed. 184; Richardson v. Green, 133 U. S. 30, 10 Sup. Ct. 280, 33 L. Ed. 516; Handley v. Stutz, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227); but Moise was not obliged to pay to the creditors of the bankrupt the full amount unpaid on his stock unless the full amount was necessary to pay the creditors of the bankrupt in full (Scovill v. Thayer, 105 U. S. 143, 26 L. Ed. 968). There is no way of determining in this proceeding what assessment shall be levied upon the stock of Moise. The amount of the assessment can only be determined in a proceeding brought by the trustee in bankruptcy against the estate of Moise, in which all the debts and expenses chargeable against the bankrupt estate and all available assets belonging thereto shall be ascertained, and the conclusion reached as to the amount of assessment necessary against the stock of Moise which, together with all available assets, will pay the creditors of the bankrupt estate in full.

It is possible that the assessment may equal the par value of the stock, or it may be much less; but whatever it shall be cannot be determined until some such proceeding as has been suggested is had. Scovill v. Thayer, supra; Rem. Auto & Motor Car Company, 153 Fed. 345, 82 C. C. A. 421. We are also of the opinion that, when the assessment to be paid upon the stock is ascertained, then no dividends should be paid on the claim of Moise until the stock assessment is fully paid, but that, in case the assessment is duly paid, then the claim of Moise shall stand allowed and share equally in the payment of dividends with claims of the same class.

The order appealed from, except as modified by this opinion, is affirmed, and the case remanded to the District Court for further proceedings not inconsistent with the views herein expressed.

(245 Fed. 548)

DELAWARE, L. & W. R. CO. v. LANTERMAN et ux.

(Circuit Court of Appeals, Third Circuit. October 20, 1917.)

No. 2242.

1. APPEAL AND ERROR ⚷1053(2)—HARMLESS ERROR—ADMISSION OF EVIDENCE—CURE.

On the trial of an action by a husband and wife against a railroad company for an assault, the statement of the husband, in answer to a question as to how soon the wife began to vomit after the affray, that she got very much worse "right after they put us in jail," did not require a reversal, where the trial judge immediately told the jury to disregard the remark, and repeated such caution in the charge; it appearing that no other allusion was made to the fact that plaintiffs had been in jail, and there being nothing to show that they were put in jail at the railroad's instance, and the remark apparently not having been made with any malicious intent.

2. APPEAL AND ERROR ⚷1058(2)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

On the trial of an action for assault, the exclusion of a question asked a witness as to whether she formed any opinion as to whether plaintiff's

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shaking spells were real or simulated was
testified at length concerning what she obs
full of her opinion, expressed or necessaril
ness was a sham.

In Error to the District Court of the Ur
of New Jersey; J. Warren Davis, District
Action by U. S. Grant Lanterman and
Lackawanna & Western Railroad Compan
and defendant brings error. Affirmed.

Frederic B. Scott, of New York City, fo
William H. Morrow, of Belvidere, N. J.,

Before BUFFINGTON, McPHERSO
cuit Judges.

McPHERSON, Circuit Judge. The p
and wife, recovered verdicts in the Distric
received at the hands of the railroad's se
the evening of June 19, 1913. The details
given. It is enough to say that from th
jury must have found that the railroad was
deliberately on the plaintiffs' land, and that
during a physical encounter that was brou
wrongful act; the amount of the verdicts i
opinion Mrs. Lanterman suffered severel
questions before us relate to four rulin
[1] 1. The railroad objects to the court
trial under the following circumstances: I
ination by his counsel concerning the exten
following questions and answers were excl

"Q. How soon after this affray was it that s
"A. I want to add to that, this shoulder keep
"Q. Yes.
"A. It was not any more than a week. *Sh*
after they put us in jail."

Thereupon the defendant's counsel move
the words in italics, but the trial judge de
the jury at the same time to pay no attentio
wards at the beginning of the charge instr
statement had no relevancy whatever to the
disregarded. Nothing else on this subject
other allusion was made to the fact that th
and no information was offered about the
been confined. It may be that they were
instance; but no such testimony was given,
left in obscurity. Assuming the statement
eral rule is thus stated in Turner v. Ame
267, 29 Sup. Ct. 424, 53 L. Ed. 788:

"The general rule is that the admission of
reversible error if it subsequently is distinctly w
tion of the jury."

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If the rule is to govern, it is clear that the answer—which was not in response to the question of counsel, but was a not unnatural addition made by the witness, and does not seem to have been made with any malicious intent—is not cause for reversal. The court dealt with it immediately by telling the jury to disregard it, and repeated the caution in the first sentences of the charge. The railroad insists, however, that the situation falls within the exception to the rule stated in Waldron v. Waldron, 156 U. S. 383, 15 Sup. Ct. 389, 39 L. Ed. 453:

"The curative effect of the correction, in any particular instance, depends on whether or not, considering the whole case and its particular circumstances, the error committed appears to have been of so serious a nature that it must have affected the minds of the jury despite the correction by the court."

Both the rule and the exception are well established, and need no discussion; but of course a trial judge must be allowed some discretion in such a matter, and we shall only add our approval of the ruling now complained of. We do not think it likely that so brief and so vague a statement, taken with the immediate correction applied by the court, could have persisted in the minds of the jury during a trial that lasted more than four days longer.

[2] 2. The other matter, which can be disposed of in a few words, is the court's refusal to allow the following question to be answered: The witness was a woman detective, who had been sent by the railroad to obtain information concerning Mrs. Lanterman's real condition, and had stayed in the house on numerous occasions for a day or two at a time. She testified at length concerning what she observed, and in the course of her examination she was asked, but was not permitted to answer:

"From your observation of the shaking spells she had while in the vestibule of the church, and while at the railroad station when there were people around, and when there was company in the house, did you form any opinion as to whether they were real or simulated?"

It is not necessary to decide whether the refusal was erroneous, for we are satisfied that no harm could have been done. We have read carefully the testimony of the witness, and find it to be full of her opinion, either expressed or necessarily implied, that the sickness of Mrs. Lanterman was a sham, and the fact that she was not allowed to say so once more seems to us to be of no importance.

We do not think the other two objections call for comment.

Finding no reversible error, the judgments are affirmed.

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MEMORANDUM DE

(245 Fed. 982)

ASANO MIYAZAKI, alias Asano Yamada, a STATES. (Circuit Court of Appeals, Ninth C 3068. Appeal from the District Court of the tory of Hawaii. Ed. F. Jared, Asst. U. S. Att

PER CURIAM. Upon motion of counsel fo therefor appearing, ordered, appeal in the for the noncompliance by the appellant with 1 of rule 16 of the Rules of Practice of this c A. cxxvii).

(245 Fed. 982)

BALLARD v. UNITED STATES. (Circuit cult. September 12, 1917.) No. 4919. In Err United States for the Eastern District of C Tahlequah, Okl., and Denton & Lee, of Musk ror. W. P. McGinnis, U. S. Atty., and Archibal U. S. Attys., all of Muskogee, Okl.

PER CURIAM. Writ of error dismissed on for failure of plaintiff in error to file briefs,

(245 Fed. 982)

In re BARR et al. (Circuit Court of Ap 1917.) No. 3030. Petition to Revise in the States for the Middle District of Tennessee; Moore & Darwin, of Chattanooga, Tenn., for of Nashville, Tenn., opposed. Dismissed purs

(245 Fed. 982)

BLESSING et al. v. BURKLEY et al. (Cir Circuit. December 14, 1916.) No. 4715. Appeal United States for the District of Nebraska. M Neb., for appellees.

PER CURIAM. Appeal dismissed, with c on motion of counsel for appellees.

(245 Fed. 982)

BLOW et al. v. BOICE. (Circuit Court of ruary 8, 1917.) No. 4891. Appeal from the States for the District of Kansas. A. S. Wils Galena, Kan., and R. E. Hollingshead, of Jopli

PER CURIAM. Cause docketed, and appe pellants, for want of prosecution, on motion o

(245 Fed. 982)

BONE et al. v. ROGERS et al. (Circuit Co June 7, 1917.) No. 2990. Appeal from the States for the Eastern District of Kentucky; J. J. Moore, of Pikeville, Ky., and Hager & Ste pellants. Auxier, Harman & Francis and Stra ville, Ky., for appellees. Dismissed pursuant

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(245 Fed. 983)

BROWN v. BROWN. (Circuit Court of Appeals, Eighth Circuit. July 10, 1916.) No. 4747. Appeal from the District Court of the United States for the Western District of Oklahoma. Kos Harris and V. Harris, both of Wichita, Kan., for appellee.

PER CURIAM. Cause docketed and appeal dismissed, without costs to either party in this court, on motion of appellee.

(245 Fed. 983)

CAPEWELL v. WAECHTER et al. (Circuit Court of Appeals, Ninth Circuit. October 16, 1917.) No. 3008. In Error to the District Court of the United States for the Fourth Division of the Territory of Alaska. E. Coke Hill, of Ruby, Alaska, Louis K. Pratt, of Fairbanks, Alaska, and Orrin K. McMurray, of Berkeley, Cal., for plaintiff in error. Jas. K. Brown and McGowan & Clark, all of Fairbanks, Alaska, for defendants in error.

PER CURIAM. Writ of error dismissed for noncompliance by plaintiff in error with the provisions of rules 23 and 24 of the Rules of Practice of this court (150 Fed. xxxiii, 79 C. C. A. xxxiii).

(245 Fed. 983)

CHICAGO GREAT WESTERN R. CO. v. LEHNER. (Circuit Court of Appeals, Eighth Circuit. April 5, 1917.) No. 4808. In Error to the District Court of the United States for the Northern District of Iowa. Carr, Carr & Evans, of Des Moines, Iowa, for plaintiff in error.

PER CURIAM. Writ of error dismissed, with costs, on motion of plaintiff in error.

(245 Fed. 983)

CHICAGO, ROCK ISLAND & PACIFIC RY. CO. v. OSBORNE. (Circuit Court of Appeals, Eighth Circuit. July 2, 1917.) No. 4847. In Error to the District Court of the United States for the Western District of Arkansas. T. S. Buzbee and H. T. Harrison, both of Little Rock, Ark., for plaintiff in error. Covington & Grant, of Ft. Smith, Ark., for defendant in error.

PER CURIAM. Writ of error dismissed, at costs of plaintiff in error, per stipulation of parties; taxation of attorney's fee for defendant in error waived.

(245 Fed. 983)

CHICAGO & N. W. RY. CO. v. McNEELY. (Circuit Court of Appeals, Eighth Circuit. September 19, 1916.) No. 4707. In Error to the District Court of the United States for the District of Nebraska. A. A. McLaughlin, Wymer Dressler, and Lyle Hubbard, all of Omaha, Neb., for plaintiff in error. M. F. Harrington, of O'Neill, Neb., for defendant in error.

PER CURIAM. Writ of error dismissed, with costs, on motion of plaintiff in error.

(245 Fed. 983)

CHIYE KAJIKAMI v. UNITED STATES. (Circuit Court of Appeals, Ninth Circuit. October 22, 1917.) No. 3064. Appeal from the District Court of the United States for the Territory of Hawaii. Ed. F. Jared, Asst. U. S. Atty., of San Francisco, Cal.

PER CURIAM. Upon motion of counsel for the appellee, and good cause therefor appearing, ordered, appeal in the above-entitled cause dismissed for the noncompliance by the appellant with the provisions of subdivision 1 of rule 16 of the Rules of Practice of this court (150 Fed. xxix, 79 C. C. A. xxix).

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(245 Fed. 983)

CLAPP v. UNITED STATES. (Circuit Cou
October 21, 1916.) No. 4119. Appeal from the
States for the Western District of Oklahoma.
and C. H. Ennis, all of Shawnee, Okl., and C. E
bell, all of Oklahoma City, Okl., for appellant.
Atty., of Oklahoma City, Okl.

PER CURIAM. Appeal dismissed, without
court, on motion of appellant.

(245 Fed. 984)

CLARK v. UNITED STATES. (Circuit Co
cuit. July 2, 1917.) No. 4981. In Error to the
States for the Western District of Oklahoma.
Okl., U. S. Atty.

PER CURIAM. Writ of error docketed an
either party in this court, on motion of defend

(245 Fed. 984)

COSKERY v. McFARLIN. (Circuit Court
May 9, 1917.) No. 173. Petition to Revise Or
the United States for the Southern District o
Des Moines, Iowa, for petitioner.

PER CURIAM. Petition to revise dismisse
motion of petitioner.

(245 Fed. 984)

CRESCENT MILLING CO. v. H. N. STRA
of Appeals, Eighth Circuit. May 10, 1917.) N
trict Court of the United States for the Di
Richardson and Walter Richardson, both of St
error. Cobb, Wheelwright & Dille, of Minnea
error.

PER CURIAM. Writ of error dismissed for
of plaintiff in error, on motion of defendant
984, 157 C. C. A. 665.

(245 Fed. 984)

CRESCENT MILLING CO. v. H. N. STRA
of Appeals, Eighth Circuit. May 10, 1917.) N
trict Court of the United States for the Di
Richardson and Walter Richardson, both of
in error. Cobb, Wheelwright & Dille, of Minn
in error.

PER CURIAM. Writ of error dismissed for
of plaintiff in error, on motion of defendant
984, 157 C. C. A. 665.

(245 Fed. 984)

CRESCENT MILLING CO. v. H. N. STRA
of Appeals, Eighth Circuit. May 10, 1917.)
District Court of the United States for the D
Richardson and Walter Richardson, both of S
Cobb, Wheelwright & Dille, of Minneapolis, Min

PER CURIAM. Appeal dismissed for wan
appellant, on motion of appellee. See, also, 24

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(245 Fed. 984)

DETROIT UNITED RY. v. MARENTETTE. (Circuit Court of Appeals, Sixth Circuit. May 18, 1917.) No. 3053. In Error to the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge. Corliss, Leete & Moody and William G. Fitzpatrick, all of Detroit, Mich., for plaintiff in error. Selling & Brand, of Detroit, Mich., for defendant in error. Dismissed on motion.

(245 Fed. 985)

DUNAVANT et al. v. MALLORY. (Circuit Court of Appeals, Eighth Circuit. December 5, 1916.) No. 4744. In Error to the District Court of the United States for the Eastern District of Arkansas. A. B. Shafer, of Memphis, Tenn., for plaintiffs in error. Allen Hughes, of Memphis, Tenn., for defendant in error.

PER CURIAM. Writ of error dismissed, at costs of plaintiffs in error, on motion of plaintiffs in error.

(245 Fed. 985)

EITARO YAMADA v. UNITED STATES. (Circuit Court of Appeals, Ninth Circuit. December 22, 1917.) No. 3067. Appeal from the District Court of the United States for the Territory of Hawaii. Ed. F. Jared, Asst. U. S. Atty, of San Francisco, Cal.

PER CURIAM. Upon motion of counsel for the appellee, and good cause therefor appearing, ordered, appeal in the above-entitled cause dismissed for the noncompliance by the appellant with the provisions of subdivision 1 of rule 16 of the Rules of Practice of this court (150 Fed. xxix, 79 C. C. A. xxix).

(245 Fed. 985)

FUHS v. GILBRECH. (Circuit Court of Appeals, Eighth Circuit. February 2, 1917.) No. 4884. Appeal from the District Court of the United States for the Southern District of Iowa. Erwin & Newell, of Davenport, Iowa, for appellee.

PER CURIAM. Appeal docketed and dismissed, at costs of appellant, for want of prosecution, on motion of appellee.

(245 Fed. 985)

GALBRAITH v. AHLEN. (Circuit Court of Appeals, Eighth Circuit. June 22, 1917.) No. 189. Petition to Revise Order of District Court of the United States for the District of Minnesota. Morphy, Bradford & Cummins, of St. Paul, Minn., for petitioner. Francis Muekel, of Chaska, Minn., for respondent.

PER CURIAM. Petition to revise dismissed, without costs to either party in this court, per stipulation of parties.

(245 Fed. 985)

G. H. WALKER & CO. et al. v. NORTH AMERICAN CO. et al. (Circuit Court of Appeals, Eighth Circuit. March 10, 1917.) No. 4806. Appeal from the District Court of the United States for the Eastern District of Missouri. J. D. & Loomis C. Johnson and Fordyce, Holliday & White, all of St. Louis, Mo., for appellants. Thomas Bond and W. F. Evans, both of St. Louis, Mo., for appellees.

PER CURIAM. Appeal dismissed, at costs of appellants, with prejudice, per stipulation of parties.

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(245 Fed. 985)

GOLDBERG et al. v. UNITED STATES. Eighth Circuit. December 4, 1916.) No. 4848. of the United States for the Eastern District c U. S. Atty., of St. Louis, Mo.

PER CURIAM. Writ of error docketed an either party in this court, etc., on motion of d

(245 Fed. 986)

GRIGSBY v. MILLER et al. (Circuit Cou November 19, 1917.) No. 3083. Appeal from th States for the District of Oregon. Almon E. R appellees.

PER CURIAM. Upon motion of counsel i therefor appearing, ordered, appeal dismissed appellant with the provisions of subdivision Practice of this court (150 Fed. xxix, 79 C. C. see 240 Fed. 188.

(245 Fed. 986)

HARRIS v. UNITED STATES. (Circuit C cuit. May 28, 1917.) No. 4894. In Error to th States for the Eastern District of Oklahoma. Okl., and Denton & Lee, of Muskogee, Okl., McGinnis, U. S. Atty., and Archibald Bonds, As gee, Okl.

PER CURIAM. Reversed, without costs to cause remanded for new trial. Confession of ernment.

(245 Fed. 986)

INTERVENING STOCKHOLDERS' COMMI BER CO. et al. v. DETROIT TRUST CO. (Ci Circuit. September 17, 1917.) No. 4974. Appe the United States for the District of New Me Arbor, Mich., for appellants. Harold T. Clar Dobson, of Albuquerque, N. M., and Sidney T. appellee.

PER CURIAM. Appeal dismissed per stipu

(245 Fed. 986)

IRON SILVER MINING CO. v. SKINNER, Appeals, Eighth Circuit. September 5, 1917.) District Court of the United States for the I Ewing and William V. Hodges, both of Denve Harry B. Tedrow, U. S. Atty., of Boulder, Col

PER CURIAM. Writ of error dismissed per costs to either party in this court.

(245 Fed. 986)

JESSUP v. UNITED STATES. (Circuit Co October 16, 1917.) No. 2979. In Error to the States for the Second Division of the District Nome, Alaska, for plaintiff in error. F. M. S Alaska.

PER CURIAM. Writ of error dismissed f in error with provisions of rules 23 and 24 of court (150 Fed. xxxiii, 79 C. C. A. xxxiii).

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(245 Fed. 986)

JUNG JOONG, alias Chin Yep, alias Chin Young Ick, alias Sang My Farn, v. Edward WHITE, as Commissioner of Immigration, Port and District of San Francisco. (Circuit Court of Appeals, Ninth Circuit. October 25, 1917.) No. 3045. Appeal from the District Court of the United States for the First Division of the Northern District of California. George A. McGowan, of San Francisco, Cal., for appellant. John W. Preston, U. S. Atty., of San Francisco, Cal.

PER CURIAM. By consent of counsel for the respective parties, ordered, appeal dismissed for the noncompliance by appellant with provisions of rules 23 and 24 of the Rules of Practice of this court (150 Fed. cxxix, cxxxi, 79 C. C. A. cxxix, cxxxi).

(245 Fed. 986)

KENNEDY v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. December 6, 1916.) No. 4849. In Error to the District Court of the United States for the Eastern District of Missouri. Walter N. Davis, of St. Louis, Mo., for plaintiff in error. Arthur L. Oliver, U. S. Atty., of St. Louis, Mo.

PER CURIAM. Writ of error docketed and dismissed, without costs to either party in this court, on motion of defendant in error, etc.

(245 Fed. 987)

KOICHI ISHII v. UNITED STATES. (Circuit Court of Appeals, Ninth Circuit. October 22, 1917.) No. 3063. Appeal from the District Court of the United States for the Territory of Hawaii. Ed. F. Jared, Asst. U. S. Atty., of San Francisco, Cal.

PER CURIAM. Upon motion of counsel for the appellee, and good cause therefor appearing, ordered appeal in the above-entitled cause dismissed for the noncompliance by the appellant with the provisions of subdivision 1 of rule 16 of the Rules of Practice of this court (150 Fed. xxix, 79 C. C. A. xxix).

(245 Fed. 987)

McCASKELL v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. January 6, 1917.) No. 4866. In Error to the District Court of the United States for the Western District of Arkansas. J. V. Bourland, U. S. Atty., of Ft. Smith, Ark.

PER CURIAM. Writ of error docketed and dismissed, without costs to either party in this court, for want of prosecution, etc., on motion of defendant in error.

(245 Fed. 987)

McINTYRE-MANN TIMBER LAND CO. et al. v. ROSENFELD. (Circuit Court of Appeals, Eighth Circuit. February 2, 1917.) No. 4860. Appeal from the District Court of the United States for the Eastern District of Arkansas. John M. Moore, of Little Rock, Ark., and Danaher & Danaher, of Pine Bluff, Ark., for appellants. Henry M. Armistead, of Little Rock, Ark., for appellee.

PER CURIAM. Appeal dismissed, at costs of appellants, except attorney fee for appellee waived, per stipulation of parties.

(245 Fed. 987)

MARENTETTE v. DETROIT UNITED RY. (Circuit Court of Appeals, Sixth Circuit. June 30, 1917.) No. 3052. In Error to the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle,

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Judge. Selling & Brand, of Detroit, Mich., 1
Leete & Moody and William G. Fitzpatrick, a
tiff in error. Dismissed pursuant to stipulati

(245 Fed. 987)

MASA KEAN v. UNITED STATES. (Ci
Circuit. October 22, 1917.) No. 3066. Appe
the United States for the Territory of Haw
Atty., of San Francisco, Cal.

PER CURIAM. Upon motion of counsel fo
therefor appearing, ordered appeal in the
for the noncompliance by the appellant with
1 of rule 16 of the Rules of Practice of this c
xxix).

(245 Fed. 987)

NATIONAL SURETY CO. v. WENTZ et a
Eighth Circuit. November 13, 1916.) No. 4
Court of the United States for the District
Lincoln, Neb., for plaintiff in error.

PER CURIAM. Writ of error dismissed, v
tiff in error.

(245 Fed. 987)

NATSU ISHII v. UNITED STATES. (Ci
Circuit. October 22, 1917.) No. 3065. Appe
the United States for the Territory of Haw
Atty., of San Francisco, Cal.

PER CURIAM. Upon motion of counsel fo
therefor appearing, ordered, appeal in the
for the noncompliance by the appellant with
1 of rule 16 of the Rules of Practice of this
A. xxix).

(245 Fed. 988)

NEFF v. SMITH. (Circuit Court of Appe
13, 1916.) No. 4701. Appeal from the Distri
for the District of Kansas. George F. Beat
lant. I. A. Smith, of Kansas City, Kan., for

PER CURIAM. Appeal dismissed, with co
failure to file brief for appellant, pursuant to

(245 Fed. 988)

O'NEILL v. UNITED STATES. (Circuit
cuit. November 20, 1916.) No. 4841. In Err
United States for the District of Minnesota.
Minn., and Charles M. Oneill, of Duluth, Mi
fred Jaques, U. S. Atty., of Duluth, Minn.

PER CURIAM. Cause docketed and wri
costs to either party in this court, on moti
stipulation of parties.

(245 Fed. 988)

POMATI v. UNITED STATES. (Circuit C
October 22, 1917.) No. 3060. Appeal from th
States for the Second Division of the Norther

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W. Preston, U. S. Atty., and Ed. F. Jared, Asst. U. S. Atty., both of San Francisco, Cal.

PER CURIAM. Upon motion of counsel for the appellee, and good cause therefor appearing, ordered, appeal dismissed for noncompliance by the appellant with the provisions of subdivision 1 of rule 16 of the Rules of Practice of this court (150 Fed. xxix, 79 C. C. A. xxix).

(245 Fed. 988)

R. WILLIAMSON & CO. v. LUMINOUS UNIT CO. (Circuit Court of Appeals, Seventh Circuit. October 18, 1917.) No. 2495. Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois. Suit by the Luminous Unit Company against R. Williamson & Co. From a decree for complainant (241 Fed. 265), defendant appeals. Affirmed. Carlos S. Andrews and A. Miller Belfield, both of Chicago, Ill., for appellant. Harry Lea Dodson, of Chicago, Ill., for appellee. Before BAKER and ALSCHULER, Circuit Judges.

PER CURIAM. The decree appealed from found valid and infringed United States patent No. 1,076,418, October 21, 1913, to Guth, for new lighting fixture, and found valid, but not infringed, United States patent No. 1,082,322, December 23, 1913, to Guth, in the same art, and found appellant guilty of unfair competition against appellee in making and marketing a fixture which resembles appellee's product and ordered injunction and accounting. The record satisfies us that the inventions for which the said patents were granted show some patentable advance even in this very much crowded art, that appellant's infringement of the first-named patent is plainly apparent, and that unfair competition appears in the very close simulation by appellant of appellee's product in respect to unessential and nonfunctional details. We find that the issues presented by this controversy were properly disposed of by the decree entered in the District Court, and that decree is accordingly affirmed.

(245 Fed. 988)

ST. LOUIS TRANSFER RY. CO. v. WATKINS. (Circuit Court of Appeals, Eighth Circuit. July 5, 1917.) No. 4979. In Error to the District Court of the United States for the Eastern District of Missouri. T. M. Pierce and J. L. Howell, both of St. Louis, Mo., for plaintiff in error. Bartley & Douglass, of St. Louis, Mo., for defendant in error.

PER CURIAM. Writ of error dismissed, at costs of plaintiff in error, per stipulation of parties; taxation of attorney fee for defendant in error waived.

(245 Fed. 989)

SCHMIDT v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. October 19, 1916.) No. 4815. In Error to the District Court of the United States for the District of North Dakota. John F. Sullivan, of Mandan, N. D., for plaintiff in error. M. A. Hildreth, U. S. Atty., of Fargo, N. D.

PER CURIAM. Cause docketed and writ of error dismissed, with prejudice, without costs to either party in this court, per stipulation of parties.

(245 Fed. 989)

SCHWIRTZ v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. March 19, 1917.) No. 4916. In Error to the District Court of the United States for the District of North Dakota. John E. Greene, of Minot, N. D., for plaintiff in error. M. A. Hildreth, U. S. Atty., of Fargo, N. D.

PER CURIAM. Writ of error docketed and dismissed, without prejudice, on motion of plaintiff in error and stipulation of parties. See, also, 245 Fed. 989, 157 C. C. A. 671.

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(245 Fed. 989)

SCHWIRTZ v. UNITED STATES. (Circ
Circuit. September 18, 1917.) No. 4986. In
the United States for the District of North
Minot, N. D., for plaintiff in error. M. A.
go, N. D.

PER CURIAM. Writ of error dismissed,
in this court, per stipulation of counsel for re
Fed. 989, 157 C. C. A. 670.

(245 Fed. 989)

SHERA v. MERCHANTS' LIFE INS. CO.
peals, Eighth Circuit. December 18, 1916.)
District Court of the United States for the
T. Hughes and E. L. McCoid, both of Keokuk,
E. Locke, of Dallas, Tex., for appellees.

PER CURIAM. Settled, and decree of Di
firmed, with costs, per stipulation of parties.

(245 Fed. 989)

SHUCART et al. v. COCA-COLA CO. et a
Eighth Circuit. October 21, 1916.) No. 478
Court of the United States for the Eastern D
Hopkins, of St. Louis, Mo., for appellees.

PER CURIAM. Cause docketed and appea
ant to rule 16, on motion of appellees.

(245 Fed. 989)

SHUCART v. UNITED STATES. (Circuit
cuit. May 8, 1917.) No. 4763. In Error to th
States for the Eastern District of Missouri.
Mo., for plaintiff in error. Arthur L. Oliver,

PER CURIAM. Writ of error dismissed,
in this court, per stipulation of parties.

(245 Fed. 989)

SIOUX CITY SERVICE CO. v. SNYDER
Eighth Circuit. September 4, 1916.) No. 47
Court of the United States for the Northern
nedy, of Sioux City, Iowa, for plaintiff in
and M. L. Sears, all of Sioux City, Iowa, fo

PER CURIAM. Writ of error dismissed,
per stipulation of parties. Attorney fee defen

(245 Fed. 990)

SKIRVIN v. FIRST NAT. BANK OF N
Court of Appeals, Eighth Circuit. January
from the District Court of the United Stat
Oklahoma. McAdams & Haskell, of Oklah
Stuart, Cruce & Cruce, Ledbetter, Stuart &
Oklahoma City, Okl., for appellee.

PER CURIAM. Appeal dismissed, at cos
of parties.

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(245 Fed. 990)

SOUTHERN RY. CO. v. SMITH. (Circuit Court of Appeals, Sixth Circuit. May 11, 1917.) No. 3056. In Error to the District Court of the United States for the Eastern District of Tennessee; Edward T. Sanford, Judge. L. D. Smith, of Knoxville, Tenn., for plaintiff in error. Pickle, Turner, Kennerly & Cate, of Knoxville, Tenn., for defendant in error. Dismissed pursuant to stipulation.

(245 Fed. 990)

STROUD v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. December 19, 1916.) No. 4748. In Error to the District Court of the United States for the District of Kansas. L. C. Boyle, I. B. Kimbrell, and M. J. O'Donnell, all of Kansas City, Mo., for plaintiff in error. Fred Robertson, U. S. Atty., of Kansas City, Mo.

PER CURIAM. Judgment reversed, without costs to either party in this court, and cause remanded, with directions to grant a new trial, on motion of plaintiff in error and statement of United States attorney for Kansas.

(245 Fed. 990)

STUDEBAKER CORP. v. SANITARY STREET FLUSHING MACH. CO. (Circuit Court of Appeals, Eighth Circuit. September 4, 1916.) No. 4590. Appeal from the District Court of the United States for the Eastern District of Missouri. Duell, Warfield & Duell, of New York City, and W. B. & Ford W. Thompson, of St. Louis, Mo., for appellant. Clifton V. Edwards, of New York City, for appellee.

PER CURIAM. Appeal dismissed, without costs to either party in this court, per stipulation of parties.

(245 Fed. 990)

TERMINAL R. R. ASS'N OF ST. LOUIS v. KIDWELL. (Circuit Court of Appeals, Eighth Circuit. July 5, 1917.) No. 4980. In Error to the District Court of the United States for the Eastern District of Missouri. T. M. Pierce and J. L. Howell, both of St. Louis, Mo., for plaintiff in error. S. Thorne Able, of St. Louis, Mo., for defendant in error.

PER CURIAM. Writ of error dismissed, at costs of plaintiff in error, per stipulation of parties; taxation of attorney's fee for defendant in error waived, etc.

(245 Fed. 990)

TOMKINS CATTLE CO. v. SAN LUIS VALLEY LAND & MINING CO. (Circuit Court of Appeals, Eighth Circuit. September 4, 1916.) No. 4727. In Error to the District Court of the United States for the District of Colorado. John R. Smith and F. E. Gregg, both of Denver, Colo., for plaintiff in error. Charles W. Waterman and Caldwell Martin, both of Denver, Colo., for defendant in error.

PER CURIAM. Judgment of District Court affirmed, at costs of plaintiff in error, per stipulation of parties.

(245 Fed. 991)

UHRICH et al. v. VAN KANNEL REVOLVING DOOR CO. (Circuit Court of Appeals, Eighth Circuit. April 23, 1917.) No. 4809. Appeal from the District Court of the United States for the District of Kansas. Helm & Helm, of Louisville, Ky., for appellants. Titian W. Johnson, of Washington, D. C., for appellee.

PER CURIAM. Appeal dismissed, without prejudice, at costs of appellants, on motion of appellants.

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(245 Fed. 991)

UNITED STATES v. LOHN. (Circuit Co
April 30, 1917.) No. 4614. Appeal from the Di
for the District of Minnesota. Alfred Jaques,
J. Powell, of Minneapolis, Minn., for appelle

PER CURIAM. Appeal dismissed, withou
court, per stipulation of parties.

(245 Fed. 991)

UNITED STATES v. MISSOURI & IOW
Appeals, Eighth Circuit. April 30, 1917.) No.
Court of the United States for the District o
S. Atty., of Duluth, Minn. R. J. Powell, of M

PER CURIAM. Appeal dismissed, withou
court, per stipulation of parties.

(245 Fed. 991)

UNITED STATES FIDELITY & GUARAN
(Circuit Court of Appeals, Eighth Circuit.
Appeal from the District Court of the United
Mexico. Catron & Catron, of Santa Fé, N.
Burkhart, U. S. Atty., of Albuquerque, N. M.

PER CURIAM. Cause docketed, and wri
costs to either party in this court, per stipul

(245 Fed. 991)

WILEY v. UNITED STATES. (Circuit Co
June 18, 1917.) No. 4971. In Error to the
States for the Western District of Oklahoma.
Lawton, Okl.

PER CURIAM. Writ of error docketed a
either party in this court, on motion of defe
plaintiff in error.

(245 Fed. 991)

WOLF BROS. & CO. v. HAMILTON BRO
of Appeals, Eighth Circuit. September 12, 191
District Court of the United States for the
Lawrence Maxwell and S. M. Johnson, both
Werner, of St. Louis, Mo., for appellant. Luk
both of St. Louis, Mo., for appellee.

PER CURIAM. Appeal dismissed, with cost

(245 Fed. 991)

ZARAFONITIS v. UNITED STATES. (Ci
Circuit. October 4, 1917.) No. 3114. In Err
United States for the Western District of
Judge. Ralph Davis, of Memphis, Tenn., fo
Kyser, U. S. Atty., of Memphis, Tenn. Dismiss

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⚷12 (U.S.C.C.A.) Pendency of suit in state court is no ground for plea in abatement to suit on same matter in federal court.—Jarrett v. Halsey, 18.

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⚷1 (U.S.C.C.A.) Accord and satisfaction requires agreement, and must finally and definitely close matter covered.—Jesson v. Noyes, 342.

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her anchorage in an unlawful place is within the admiralty jurisdiction.—Strathleven Steamship Co. v. Baulch, 38.

IX. APPEAL.

⚷118 (U.S.C.C.A.) A finding on a question, of fact by an admiralty court, which heard the witnesses, will be accepted by the appellate court, unless the evidence greatly preponderates against it.—Globe S. S. Co. v. Moss, 350.

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ALIENATION.

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ALIENS.

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⚷23(1) (U.S.C.C.A.) That a Chinese person sought to be deported was a merchant did not entitle him to remain, where his status as such was acquired subsequent to his entry into the country surreptitiously, by escaping from detention quarters after he had been denied permission to land.—Gin Dock Sue v. United States, 500.

Chinese merchant, connected with association of Chinese persons attached to consulate, *held* not an officer of Chinese government traveling on business of government, within Act May 6, 1882, c. 126, § 13, as amended by Act July 5, 1884, c. 220.—Id.

Chinese person, though secretary of association connected with consulate, *held* not consular attendant, within Act Sept. 13, 1888, c. 1015, § 14, exempting consuls and attendants from exclusion provisions.—Id.

⚷31 (U.S.C.C.A.) Where, admission of Chinese person being refused, he escaped from detention and remained in country for over three years, *held* that, under Immigration Act, § 21, he might thereafter be ordered deported; denial of admission being equivalent to deportation proceedings within three years.—Gin Dock Sue v. United States, 500.

⚷32(2) (U.S.C.C.A.) Proceedings for the deportation of Chinese persons under the Exclusion Acts are not limited to three years by sections 20 and 21 of Immigration Act of February 20, 1907.—Wong Chung v. United States, 36.

⚷32(2) (U.S.C.C.A.) A Chinese alien who has entered this country in violation of Act Feb. 20, 1907, may be deported on order of the Commissioner of Labor under that act, § 20, at any time within three years.—Mok Nuey Tau v. White, 190.

⚷32(2) (U.S.C.C.A.) The Commissioner of Labor has authority, under Immigration Act Feb. 20, 1907, § 20, to order the deportation of a Chinese alien found illegally in this country, within three years after his entry.—Quan You v. White, 194.

⚷32(5) (U.S.C.C.A.) Immigration officers have jurisdiction of proceedings for deportation of a Chinese person charged with being unlawfully in this country, although defendant claims to be an American citizen, and the burden of proof on that, as on other issues, is on defendant.—Chin Ah Yoke v. White, 290.

⚷32(8) (U.S.C.C.A.) A finding by both the commissioner and District Court, which heard the witnesses, against the claim of a person of Chinese descent that he was born in the United States, *held* not so clearly erroneous as to warrant its reversal.—Wong Chung v. United States, 36.

⚷32(8) (U.S.C.C.A.) Statement of resident of Mexico, identifying photograph of Chinese sought to be deported for having entered United States from Mexico in violation of Chinese Exclusion Act of 1888, § 7, *held* not sufficient legal foundation for order of deportation.—White v. Tom Yuen, 187.

⚷32(8) (U.S.C.C.A.) Proceedings for deportation of a Chinese person *held* not unfair, and an order of deportation *held* sustained by the evidence.—Mok Nuey Tau v. White, 190.

⚷32(8) (U.S.C.C.A.) Proceedings for deportation of a Chinese alien *held* not unfair, and an order for his deportation sustained by the evidence.—Quan You v. White, 194.

⚷32(8) (U.S.C.C.A.) Evidence *held* to sustain a finding by immigration officers that a Chinese woman, arrested for being unlawfully in the United States, was an alien, and not, as claimed, a native citizen.—Chin Ah Yoke v. White, 290.

⚷32(9) (U.S.C.C.A.) Inability to produce a witness for cross-examination in deportation proceedings against a Chinese person *held* not to invalidate the proceedings.—Chin Ah Yoke v. White, 290.

⚷32(11) (U.S.C.C.A.) On application of a Chinese alien for entry, the commissioner has jurisdiction to order rehearings until the facts are sufficiently developed to afford a basis for his judgment.—Chew Hoy Quong v. White, 197.

⚷32(12) (U.S.C.C.A.) An order denying admission to this country of a Chinese alien *held* to have been made after a fair hearing, and to be sustained by the evidence.—Chew Hoy Quong v. White, 197.

⚷32(12) (U.S.C.C.A.) Chinese person's right to enter country as returning Chinese merchant cannot be reviewed, where, pending an application to reopen his case, admission having been denied, he escaped from detention quarters, for proceedings before immigration officials can be reviewed only if unfair.—Gin Dock Sue v. United States, 500.

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III. IMMIGRATION.

⚷51 (U.S.C.C.A.) Under Act Feb. 20, 1907, §§ 2, 3, as amended by Act March 26, 1910, §§ 1, 2, alien who, having entered United States, leases premises to prostitutes in which they ply their trade, is not to be deported as receiving earnings of prostitutes.—Katz v. Commissioner of Immigration at Port of San Francisco, Cal., 508.

⚷54 (U.S.C.C.A.) In proceeding for deportation of alien, evidence *held* insufficient to show that he was receiving earnings of prostitute.—Katz v. Commissioner of Immigration at Port Port of San Francisco, Cal., 508.

⚷54 (U.S.C.C.A.) In a proceeding for the deportation of an alien, evidence *held* insufficient to show that he had received or was receiving the earnings of a prostitute; hence deportation was improperly ordered.—Backus v. Katz, 512.

IV. NATURALIZATION.

⚷71½ [New, vol. 7 Key-No. Series] (U.S.C.C.A.) Under Act June 29, 1906, c. 3592, §§ 4, 5, substitution of witness whose affidavit was not attached to petition for naturalization in place of one of those verifying the petition *held* to render the certificate illegal and subject to cancellation.—United States v. Gulliksen, 175.

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See Indians.

AMBIGUITIES.

See Evidence, ⚷451, 452.

AMENDMENT.

See Pleading, ⚷236; Statutes.

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See Exceptions, Bill of.

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⚷4 (U.S.C.C.A.) An order entered in a suit in equity brought by a receiver, vacating a previous order made on settlement of a compromise decree allowing fees to counsel for the receiver, *held* properly reviewable by appeal.—McPherson v. United States, 331.

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⚷78(3) (U.S.C.C.A.) Order sustaining demurrer to plea in recoupment, where issues raised by a plea denying plaintiff's claim were not disposed of, is not a final judgment, within Judicial Code, § 128, and a writ of error to review same will be dismissed.—Treadwell v. Corker & Smith, 540.

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ery fair inference therefrom.—Davis v. Carnegie Steel Co., 281.

(G) Questions of Fact, Verdicts, and Findings.

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⟹1002 (U.S.C.C.A.) A verdict on conflicting evidence will not be disturbed.—Chicago, B. & Q. R. Co. v. Dawson, 530.

⟹1008(1) (U.S.C.C.A.) Appellate court will not disturb findings of trial court on questions of fact unless it appears that latter court is clearly in error.—Vineyard Land & Stock Co. v. Twin Falls Oakley Land & Water Co., 326.

⟹1008(2) (U.S.C.C.A.) A case tried to the court pursuant to Rev. St. § 649 (Comp. St. 1916, § 1587), and in which the finding was general, is reviewable only for errors of law to which exceptions were reserved.—Union Pac. R. Co. v. Laughlin, 656.

⟹1010(1) (U.S.C.C.A.) Where an action is tried to the court without a jury by stipulation under Rev. St. § 649 (Comp. St. 1916, § 1587), the judgment is not subject to revision, if supported by the findings and there is material evidence in support of such findings.—Schoenwald v. Bishop, 163.

⟹1023 (U.S.C.C.A.) Where an action is tried to the court by stipulation under Rev. St. § 649 (Comp. St. 1916, § 1587), the refusal of requests for findings *held* not subject to review.—Schoenwald v. Bishop, 163.

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⟹1039(9) (U.S.C.C.A.) Any error in requiring plaintiff to elect between paragraphs *held* harmless, where practically all evidence was admitted, and no error was claimed in the instructions bearing on the excluded paragraph.—Robbins v. Pennsylvania Co., 597.

⟹1041(3) (U.S.C.C.A.) In action on judgment on note given in settlement of an action, refusal to permit amendment, to allege that note sued on in the original action had not been returned, *held* harmless.—Westwater v. Murray, 589.

⟹1052(8) (U.S.C.C.A.) Admission of evidence as to reason for omitting signals as railway engine approached bridge where decedent was struck *held* harmless, where evidence showed contributory negligence.—Robbins v. Pennsylvania Co., 597.

⟹1053(2) (U.S.C.C.A.) In action for assault, remark of plaintiff, not called for by question, as to being put in jail, *held* not to require a reversal, where the trial judge told the jury to disregard it, and repeated the caution in the charge.—Delaware, L. & W. R. Co. v. Lanterman, 660.

⟹1058(2) (U.S.C.C.A.) Exclusion of question calling for opinion of witness as to whether plaintiff's injuries were real or simulated *held* harmless, where her testimony showed her opinion that plaintiff's sickness was a sham.—Delaware, L. & W. R. Co. v. Lanterman, 660.

⟹1059 (U.S.C.C.A.) Exclusion of evidence that place on railroad right of way where decedent was struck was part of a highway *held* immaterial, in view of the evidence, where court ruled that rights and obligations were the same as on a highway.—Robbins v. Pennsylvania Co., 597.

⟹1070(1) (U.S.C.C.A.) Where directed verdict was signed by one juror designated by the court, *held* that plaintiff was not prejudiced because all the jurors did not sign it or select their own foreman to sign it.—Bryan v. Louisville & N. R. Co., 98.

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APPLIANCES.

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APPOINTMENT.

See Principal and Agent; Receivers, ⟹35; United States Marshals.

APPORTIONMENT.

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See Execution; Homestead.

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⚷1 (U.S.C.C.A.) Where there was personal service on defendant, though its property was attached, action is personal one; attachment being for purposes of security only.—Rederiaktiebolaget Amie v. Universal Transp. Co., 474.

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⚷49 (U.S.C.C.A.) A court of bankruptcy *held* to have power to permit the intervention of stockholders to contest a voluntary petition filed by the officers and directors, where its purpose was shown to have been fraudulent.—Zeitinger v. Hargadine-McKittrick Dry Goods Co., 167.

(C) Involuntary Proceedings.

⚷52 (U.S.C.C.A.) Bankruptcy proceedings are in nature of proceedings in equity, and bankruptcy courts administer law according to spirit of equity.—Clark v. Johnson, 604.

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(B) Assignment, and Title, Rights, and Remedies of Trustee in General.

⚷140(1) (U.S.C.C.A.) Title of cement passing with delivery to purchaser is not affected by representation in contract that it would be used in a certain building being breached by buyer's subsequent bankruptcy.—Citizens' Coal & Supply Co. v. Custard, 51.

(C) Preferences and Transfers by Bankrupt, and Attachments and Other Liens.

⚷160 (U.S.C.C.A.) The execution of a mortgage by one not shown to then be insolvent, to indemnify surety company which became surety on the bond of a construction company, cannot, the transaction being a future one, be treated as preferential.—Angle v. Bankers' Surety Co., 27.

⚷164 (U.S.C.C.A.) Deposit of gold dust in bank to account of bankrupt depositor is not transfer of money as payment or security, and does not operate to diminish estate of depositor.—American Bank of Alaska v. Johnson, 504.

⚷172 (U.S.C.C.A.) In a suit by trustee in bankruptcy to set aside mortgage executed by bankrupt to surety on construction company's bond, *held*, that trustee could not attack trans-

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appraisement of the property was evidence upon which it might base a valid discretion.—Id.

Under Bankruptcy Act, § 70b, appraisement of bankrupt property is evidence upon which court may act in setting aside public sale for gross inadequacy of price.—Id.

Where bankruptcy court set aside sale for gross inadequacy of price, and not because of offer of better bid, *held*, that it was not improper to condition order for resale on giving of bond to insure better price on resale.—Id.

⚷272 (U.S.C.C.A.) Where receiver in bankruptcy took possession of chattels subject to mortgage, amount of which exceeded their value, and property was subsequently disposed of by trustee, trustee is entitled to allowances for taxes paid and expenses in preserving property.—C. B. Norton Jewelry Co. v. Hinds, 533.

(E) Actions by or Against Trustee.

⚷303(1) (U.S.C.C.A.) In a suit to set aside a mortgage given by a bankrupt to induce surety company to make advances to construction company and to indemnify it as surety, *held*, that bankrupt's trustee had burden of showing repayment of advances by construction company.—Angle v. Bankers' Surety Co., 27.

⚷303(3) (U.S.C.C.A.) In a suit to set aside mortgage executed by bankrupt to induce defendant to make advances to construction company, etc., evidence *held* to show advances had not been repaid by construction company.—Angle v. Bankers' Surety Co., 27.

⚷303(3) (U.S.C.C.A.) In suit by trading company's trustee in bankruptcy for accounting and restitution of assets, etc., evidence *held* to show that when president of packing company assigned to officer of defendant company shares of stock in packing company and debt owing trading company by packing company for merchandise, trading company was insolvent, and that assignor and assignees had ample reason so to believe.—Sanborn-Cutting Co. v. Paine, 120.

⚷303(3) (U.S.C.C.A.) In action against bank to recover gold dust delivered to same by bankrupt firm, evidence *held* to show that transaction was bona fide, and that at time of delivery bank did not know firm was insolvent, etc.—American Bank of Alaska v. Johnson, 504.

⚷306 (U.S.C.C.A.) Where trustee in bankruptcy took no appeal from decree of District Court, Circuit Court of Appeals may not consider point made in his brief that District Court erred in not making allowance.—Sanborn-Cutting Co. v. Paine, 120.

(F) Claims Against and Distribution of Estate.

⚷326 (U.S.C.C.A.) Where depositor, who was indebted to bank, made deposit in usual course of business, bank's application of amount of deposit to its indebtedness is valid as set-off, under Bankruptcy Act July 1, 1898, § 68a, and is not preference, under section 60a.—American Bank of Alaska v. Johnson, 504.

That books of bank did not show entry of credit until day after deposit of gold dust does not change character of transaction, where at time of delivery of dust to bank credit was actually given by tellers' slips.—Id.

⚷341 (U.S.C.C.A.) A creditor of a bankrupt corporation, who was also holder of unpaid stock, *held* erroneously required to pay his stock subscription in full as a condition to the allowance of his claim.—Moise v. Scheibel, 658.

⚷359 (U.S.C.C.A.) That one creditor of a bankrupt had orally promised another creditor of the same class that its claim should be paid does not estop the former from receiving dividends equally with the latter.—Moise v. Scheibel, 658.

(G) Accounting and Discharge of Trustee.

⚷368 (U.S.C.C.A.) Though mortgagee consented, *held*, that trustee in bankruptcy, who sold chattels subject to mortgage, is not, where it was apparent no surplus would result for benefit of general estate in bankruptcy, entitled to commissions.—C. B. Norton Jewelry Co. v. Hinds, 533.

Where it was apparent that no surplus would result to general estate, *held*, that trustee in bankruptcy is not, under Bankruptcy Act July 1, 1898, as amended by Act June 25, 1910, entitled to commissions on proceeds resulting from sale of chattels subject to mortgage.—Id.

VI. APPEAL AND REVISION OF PROCEEDINGS.

(A) Superintendence and Revision.

⚷446 (U.S.C.C.A.) Discretion of bankruptcy court in approving or setting aside public sale under Bankruptcy Act, § 70b, will not be disturbed or interfered with, unless abused.—Jacobsohn v. Larkey, 650.

⚷447 (U.S.C.C.A.) Decree of Circuit Court of Appeals reviewing decision of District Court affirming two orders of referee in bankruptcy *held* to vacate both orders.—In re Blum, 43.

(B) Appeal.

⚷461 (U.S.C.C.A.) Where, after an order allowing a claim in bankruptcy, a rehearing is granted, the time for taking an appeal is extended, and runs from the time the order is made final.—Todd v. Alden, 624.

⚷467 (U.S.C.C.A.) Order of trial court, confirming referee's report overruling objections to composition, based on ground that bankrupt had obtained credit by materially false written statement, will not be disturbed, where evidence did not clearly show that trial court was wrong.—International Trust Co. v. Myers, 406.

BANKS AND BANKING.

See Accord and Satisfaction; Principal and Surety.

II. BANKING CORPORATIONS AND ASSOCIATIONS.

(E) Insolvency and Dissolution.

⚷77(4) (U.S.C.C.A.) Where, contrary to statute and not in good faith, directors of bank declared dividends out of its capital and purchased for bank its stock, diverted funds may be recovered for subsequent creditors of bank in suit against directors and sellers of stock.—Jesson v. Noyes, 342.

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CHAMPERTY AND MAINTENANCE.

⚷5(3) (U.S.C.C.A.) Attorney's contract for contingent compensation, whereby he is to pay entire expense, control settlement, and be jointly interested in the property recovered, *held* unenforceable in equity.—Jones v. Pettingill, 461.

Attorney's champertous contract *held* unenforceable in equity, though suit was not brought against the client, but against the purchaser of her interest in the property recovered.—Id.

⚷5(6) (U.S.C.C.A.) Agreement between attorney and client for contingent compensation, whereby attorney is to pay entire expense, control settlement, and be jointly interested in the property recovered, *held* obnoxious to the law of Porto Rico, in view of Civ. Code 1902, § 1362.—Jones v. Pettingill, 461.

⚷5(7) (U.S.C.C.A.) Objection that contract sued on, being contrary to good morals and champertous, should not be enforced in equity, may be considered by the District Court of its own motion.—Jones v. Pettingill, 461.

CHANCERY.

See Equity.

CHARGE.

To jury, see Criminal Law, ⚷780, 823; Trial, ⚷260, 296.

CHARITIES.

See Perpetuities.

CHATTEL MORTGAGES.

See Bankruptcy, ⚷184.

CHATTELS.

See Property.

CHEAT.

See Fraud.

CHECKS.

See Payment.

CHINESE.

See Aliens, ⚷23–32.

CIRCUIT COURTS OF APPEALS.

See Courts, ⚷405–407.

CITATION.

See Appeal and Error, ⚷399.

CITIZENS.

See Aliens; Indians.

CLAIMS.

See Bankruptcy, ⚷326–359.

COLLATERAL UNDERTAKINGS.

See Guaranty.

COLLISION.

See Indemnity.

IX. FOG OR THICK WEATHER.

⚷82(3) (U.S.C.C.A.) A sailing vessel which is making her best speed in a dense fog, with all sails set and drawing, is not going at the "moderate speed" required by article 16 of the International Rules.—The Robert M. Thompson, 110.

⚷83 (U.S.C.C.A.) A steamship and a schooner both *held* in fault for a collision off Cape Henry in a dense fog, while on crossing courses, for going at excessive speed.—The Robert M. Thompson, 110.

X. NARROW CHANNELS, HARBORS, RIVERS, AND CANALS.

⚷94 (U.S.C.C.A.) An overtaking vessel, which after coming even with the overtaken vessel, ran side by side and parallel with her for two miles in the channel, then changed to a converging course, *held* solely in fault for a collision between them.—The Samarinda, 192.

COMBINATIONS.

See Monopolies.

COMMERCE.

See Shipping.

I. POWER TO REGULATE IN GENERAL.

⚷5 (U.S.C.C.A.) Safety Appliance Act March 2, 1893, c. 196, as amended by Act April 1, 1896, c. 87, Act March 2, 1903, c. 976, and Act April 14, 1910, c. 160, *held* valid, being fairly within the scope of a regulation of interstate commerce.—Great Northern Ry. Co. v. United States, 32.

COMMERCIAL PAPER.

See Bills and Notes.

COMMUNITY PROPERTY.

See Husband and Wife.

COMPARATIVE NEGLIGENCE.

See Negligence, ⚷97.

COMPENSATION.

See Bankruptcy, ⚷368; Eminent Domain; Salvage, ⚷8, 18.

COMPLAINT.

See Indictment and Information.

COMPOSITIONS WITH CREDITORS.

See Compromise and Settlement.

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against public policy and void.—Jones v. Pettingill, 461.

II. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

⟹176(6) (U.S.C.C.A.) Where entire contract was found in correspondence between parties, trial judge should construe same.—United States Steel Products Co. v. Poole-Dean Co., 645.

⟹176(7) (U.S.C.C.A.) If contract was partly written and partly parol, question of its terms is for jury.—United States Steel Products Co. v. Poole-Dean Co., 645.

Under defendant's admissions in its answer, and in view of correspondence between parties, *held*, that entire contract was not contained in correspondence between parties, and question of terms was for jury.—Id.

(B) Parties.

⟹186(2) (U.S.C.C.A.) Defendant, principal contractor, who subcontracted with plaintiff to do part of work cannot defeat plaintiff's action on theory that plaintiff was doing work for defendant's principal; plaintiff having no contractual relations with principal.—United States Steel Products Co. v. Poole-Dean Co., 645.

V. PERFORMANCE OR BREACH.

⟹280(1) (U.S.C.C.A.) Where contract required water intake pipe 800 feet from shore to be buried 1 foot deep, dredging of ditch 12 inches deep, in which pipe was laid even with bed of lake, *held* not to show compliance warranting recovery by contractor.—City of Port Washington v. Thacher, 390.

⟹322(2) (U.S.C.C.A.) In action by contractor, where city alleged defects in intake pipe laid by him, which allowed entrance of water close to shore of lake, contractor might show that number of bacteria found in water from pipe corresponded with number found in same quantity of water at point of intake.—City of Port Washington v. Thacher, 390.

⟹323(1) (U.S.C.C.A.) That defects appeared in intake pipe, on test made some three years after construction, *held* not to show that contractor failed to comply with contract, but that question should be left to jury.—City of Port Washington v. Thacher, 390.

⟹323(2) (U.S.C.C.A.) Where facts were not in dispute, question whether contractor had complied with written contract is for the court.—City of Port Washington v. Thacher, 390.

CONTRIBUTORY NEGLIGENCE.

See Negligence.

CONVEYANCES.

See Homestead, ⟹118; Mortgages.

CORPORATIONS.

See Bankruptcy, ⟹245, 341; Banks and Banking; Mines and Minerals, ⟹105; Railroads; Waters and Water Courses, ⟹240–254.

V. MEMBERS AND STOCKHOLDERS.

(A) Rights and Liabilities as to Corporation.

⟹182 (U.S.C.C.A.) President of corporation, who owned all but two shares of its stock, could not ignore fact that there was corporate existence not to be disregarded at his will, as an individual stockholder, by independent attempt to convey property of the corporation.—Sanborn-Cutting Co. v. Paine, 120.

Trading company did not waive claim upon assets of packing company, debtor to it, through acts of majority stockholder in trading company; he was not the corporation, and could not use its assets for his own benefit or deprive its creditors of their claims upon the assets.—Id.

(D) Liability for Corporate Debts and Acts.

⟹243(1) (U.S.C.C.A.) Bona fide purchasers in open market of certificates issued by voting trustees of corporate stock, calling for delivery of full-paid stock on termination of trust, *held* not liable as subscribers for unpaid stock.—Clark v. Johnson, 604.

VI. OFFICERS AND AGENTS.

(C) Rights, Duties, and Liabilities as to Corporation and Its Members.

⟹318 (U.S.C.C.A.) Contracts between corporations having common directors, while not prohibited, are voidable; and the burden rests on those seeking to sustain them to show clearly that they were entirely fair and free from wrong.—Geddes v. Anaconda Copper Mining Co., 417.

Minority shareholders cannot prevent sale of corporate property to a corporation in which majority shareholders were interested, where it was free from unfairness and purchasing corporation made highest offer.—Id.

Sale of entire property of corporation will not be set aside, though price was inadequate, and purchasing and selling corporations had common directors, unless it appears a higher price can be obtained on public sale, and on failure sale should be confirmed.—Id.

VII. CORPORATE POWERS AND LIABILITIES.

(A) Extent and Exercise of Powers in General.

⟹387(1) (U.S.C.C.A.) Where a construction company conveyed its plant to its surety, one who had given a mortgage to the surety to indemnify it for liability cannot object that the conveyance was ultra vires, only the company being entitled to make that objection.—Angle v. Bankers' Surety Co., 27.

⟹388(1) (U.S.C.C.A.) Where road was not built, *held*, that mining company could not defeat recovery for promotion work on ground that it had no authority to build such road.—Quicksilver Mining Co. v. Anderson, 363.

(B) Representation of Corporation by Officers and Agents.

⟹404(1) (U.S.C.C.A.) That stockholders, whose stock was nonassessable, were of ample means to pay assessments, does not deprive the directors of power to dispose of corporate

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property, on the theory that assessments necessary to carry on the business could not be levied.—Geddes v. Anaconda Copper Mining Co., 417.

At common law the directors of a private corporation could sell or otherwise dispose of the corporate property, subject to the limitation that it could not sell or dispose of the entire property.—Id.

Under Utah act of 1905 (Comp. Laws 1907, § 322), directors of a Utah corporation *held* authorized to dispose of all its property with consent of majority of shareholders.—Id.

⚷432(12) (U.S.C.C.A.) In action against mining company to recover for services rendered in organization of corporation for building electric railroad leading from mine to central point, and procuring rights of way, etc., evidence *held* to warrant finding that president of corporation who engaged plaintiff was acting within scope of his authority.—Quicksilver Mining Co. v. Anderson, 363.

(F) Civil Actions.

⚷506 (U.S.C.C.A.) Owner of large proportion of stock of defendant company, and in position to control its action, was proper party defendant to suit against company.—Vineyard Land & Stock Co. v. Twin Falls Oakley Land & Water Co., 326.

⚷519(3) (U.S.C.C.A.) In a suit by minority shareholders to set aside a conveyance of the entire corporate property, evidence *held* to sustain a finding that the consideration was inadequate.—Geddes v. Anaconda Copper Mining Co., 417.

In suit by minority stockholders to set aside contract whereby entire property of mining company was sold to defendant, where president of mining company was director of defendant, evidence *held* insufficient to clearly show that contract was entirely fair and free from wrong.—Id.

⚷523 (U.S.C.C.A.) Service in supplementary proceedings against a corporation judgment defendant on a director *held* a valid service on the corporation, although the director had sent in his resignation pursuant to a scheme to defeat collection of the judgment.—Inventions Corp. v. Hobbs, 56.

VIII. INSOLVENCY AND RECEIVERS.

⚷542(1) (U.S.C.C.A.) Where creditors of insolvent corporation or those representing creditors assail transfers and agreements as prejudicial to their rights, question is not whether transfers and agreements are to be upheld as between parties, but whether law will avail creditors to obtain possession of property transferred as subject to corporate debts.—Sanborn-Cutting Co. v. Paine, 120.

Transfer from insolvent packing company to another company, made with knowledge and intent of packing company's directors that it should cease business after transfer, *held* not to operate to defeat claims of packing company's creditors.—Id.

⚷548(9) (U.S.C.C.A.) A judgment creditor of a corporation which owned patents *held*, on the evidence, not entitled to cancellation of license contracts made pending the action as conveyances in fraud of creditors.—Inventions Corp. v. Hobbs, 56.

XI. DISSOLUTION AND FORFEITURE OF FRANCHISE.

⚷603 (U.S.C.C.A.) A sale of all of the property of a corporation does not necessarily terminate its corporate existence.—Geddes v. Anaconda Copper Mining Co., 417.

⚷610(2) (U.S.C.C.A.) Where authorized by statute, minority of shareholders cannot prevent dissolution by majority.—Geddes v. Anaconda Copper Mining Co., 417.

COSTS.

See Courts, ⚷405.

COURT RULES CITED.

Equity Rule 22—245 F. 254, 446.

COURTS.

See Admiralty; Constitutional Law, ⚷70; Habeas Corpus; Taxation.

I. NATURE, EXTENT, AND EXERCISE OF JURISDICTION IN GENERAL.

⚷29 (U.S.C.C.A.) Rem may not be affected by direct operation of decree where it is beyond territorial jurisdiction of court, but court may, acting in personam, coerce action respecting such property.—Vineyard Land & Stock Co. v. Twin Falls Salmon River Land & Water Co., 305.

VII. UNITED STATES COURTS.

(A) Jurisdiction and Powers in General.

⚷259 (U.S.C.C.A.) Federal court in exercise of its general equity jurisdiction has power to appoint a receiver on a stockholder's bill, determine corporation's solvency, and distribute its assets, and no state statute can impair or destroy that power.—O'Neil v. Welch, 453.

⚷262(2) (U.S.C.C.A.) Suit to compel railroad company to issue bill of lading for transportation of carload of wheat *held* not within jurisdiction of federal court of equity because of there being adequate remedy at law.—Northern Pac. Ry. Co. v. Van Dusen Harrington, Co., 616.

⚷262(3) (U.S.C.C.A.) Where plaintiffs had legal title and such possession of timber land as its character made reasonably practicable, and defendants had trespassed thereon and were continuing to do so, legal remedy *held* inadequate, so that bill in equity would lie.—A. G. Wineman & Sons v. Reeves, 446.

Equitable remedy, under Code Miss. 1906, §§ 549–552, for confirmation of title to land, *held* enforceable in federal court, unless plaintiffs have an adequate and equally efficient remedy at law.—Id.

⚷266 (U.S.C.C.A.) Contempt proceeding for violation of injunction *held* civil in nature, so that under Judicial Code, § 51, District Court for Eastern District of Wisconsin could not issue writ to marshal for district of Massachu-

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setts for arrest of the defendants.—Mitchell v. Dexter, 276.

District Court *held* not authorized to issue warrant for arrest of defendant in another state, under Judicial Code, § 262, even though the contempt proceeding under which writ was issued was a criminal one.—Id.

⚷280 (U.S.C.C.A.) In determining whether the alleged unconstitutionality of a state statute gives jurisdiction to a federal court, the presumption is that, if the statute is unconstitutional, the state courts will so declare.—Supreme Council of Royal Arcanum v. Hobart, 11.

(B) Jurisdiction Dependent on Nature of Subject-Matter.

⚷282(3) (U.S.C.C.A.) Violation of plaintiff's rights under Const. U. S. Amend. 14, by St. Mass. 1911, c. 628, § 25, *held* not to give federal court jurisdiction, unless such violation is an essential part of the cause of action.—Supreme Council of Royal Arcanum v. Hobart, 11.

Federal court *held* without jurisdiction of certificate holder's suit for receiver of fraternal society, even though St. Mass. 1911, c. 628, § 25, prohibiting such suits, violated his rights under Const. U. S. Amend. 14.—Id.

(E) Procedure, and Adoption of Practice of State Courts.

⚷333 (U.S.C.C.A.) The federal courts follow the state practice.—Quirk v. Bank of Commerce & Trust Co., 130.

⚷337 (U.S.C.C.A.) Except where Congress has made specific provisions, common law governs procedure in criminal trials in federal courts, and, no such provision being made, local state statute as to accomplice testimony is inapplicable to prosecution in federal court.—Bandy v. United States, 394.

(F) State Laws as Rules of Decision.

⚷366(7) (U.S.C.C.A.) Holding of state court that no written acceptance of state Constitution is necessary to entitle railroad company to rights under future legislation, pursuant to Const. Ala. 1901, § 246, *held* binding on a federal court.—Bryan v. Louisville & N. R. Co., 98.

⚷372(1) (U.S.C.C.A.) A federal court is not bound by a decision of the highest court of a state upon a question of general law, which was not rendered until after the commencement of the suit in which it is invoked.—Hart v. Adair, 247.

⚷374 (U.S.C.C.A.) Indictments in federal courts are not amenable to state laws.—Simpson v. United States, 470.

⚷375 (U.S.C.C.A.) As federal commerce statutes, requiring carrier to collect full transportation charges provided in authorized tariffs, contain no period of limitation, local limitation statutes govern; hence, in action in federal District Court for South Dakota for undercharge, Code Civ. Proc. S. D. § 60, is applicable.—Chicago & N. W. Ry. Co. v. Ziebarth, 526.

Action by carrier to recover full charges authorized, brought in federal court under commerce statute, is governed by local state statutes of limitation.—Id.

(H) Circuit Courts of Appeals.

⚷405(1) (U.S.C.C.A.) Appeal *held* appropriate procedure to review judgment of Supreme Court of Porto Rico, enjoining operation of railroad and directing removal of same from plaintiffs' land; hence writ of error to judgment will be dismissed.—Plazuela Sugar Co. v. Pastoriza, 411.

⚷405(1) (U.S.C.C.A.) Appeals and writs of error are to be taken to Circuit Court of Appeals in manner practiced in Supreme Court before 1891.—Rederiaktiebolaget Amie v. Universal Transp. Co., 474.

⚷405(14) (U.S.C.C.A.) Under Rev. St. § 1000 (Comp. St. 1916, § 1660), writ of error, but for Supreme Court rule 29 (32 Sup. Ct. xii), of which rule 13 for Circuit Courts of Appeals (150 Fed. xxviii, 79 C. C. A. xviii) is a copy, can be perfected and cause heard without any security at all, except for costs.—Rederiaktiebolaget Amie v. Universal Transp. Co., 474.

⚷405(15) (U.S.C.C.A.) Under Judicial Code, § 129, judge of Circuit Court of Appeals may on appeal from order granting injunction pendente lite, stay operation of same.—Masses Pub. Co. v. Patten, 398.

On appeal from order granting temporary injunction against enforcement of order of Post Office Department excluding plaintiff's publication from mails, *held*, that judge of Circuit Court of Appeals should, during pendency of appeal, stay operation of injunction.—Id.

⚷405(15) (U.S.C.C.A.) Under Supreme Court rule 29 (32 Sup. Ct. xii), of which rule 13 for Circuit Courts of Appeals (150 Fed. xxviii, 79 C. C. A. xxviii) is copy, *held* that, though no supersedeas bond was given when writ of error was taken, it is, under Rev. St. § 1000 (Comp. St. 1916, § 1660), mere irregularity, and any Circuit Judge or judge of Circuit Court of Appeals may, after expiration of 60-day period prescribed by section 1007 (section 1666), fix amount of supersedeas bond.—Rederiaktiebolaget Amie v. Universal Transp. Co., 474.

Where judge signing writ of error and citation fixed amount of supersedeas bond by formal order, judge of Circuit Court of Appeals will not interfere with amount fixed in order, though citation was signed without production of bond.—Id.

In action begun by attachment, where defendant's interest in ship was attached, and same was freed from attachment, and maritime lien by instrument securing plaintiff and lienholder, *held*, that plaintiff might, on recovery of judgment, issue execution, and supersedeas bond was necessary, under Circuit Court of Appeals rule 13, where defendant sued out writ of error.—Id.

⚷405(17) (U.S.C.C.A.) Under the express provisions of rule 11, and of rule 24, par. 4 (150 Fed. xxvii, xxxiii, 79 C. C. A. xxvii, xxxiii), of the Rules for the first Circuit, the court may, at its option, notice plain errors, though not assigned.—Jones v. Pettingill, 461.

⚷405(18) (U.S.C.C.A.) Though court discussed questions other than jurisdictional question upon which decision was based, *held*, that rehearing on such questions would not be ordered.—Supreme Council of Royal Arcanum v. Hobart, 11.

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XII. TRIAL.

(C) Reception of Evidence.

⚷678(3) (U.S.C.C.A.) Under indictment under Comp. Laws Territory Alaska 1913, § 266, charging that on July 30, 1913, defendant wantonly wasted and destroyed salmon taken in waters of Alaska, prosecution's evidence tending to prove offense on July 26th was not an election to prove the offense on that day.—Alaska Packers' Ass'n v. United States, 158.

⚷678(4) (U.S.C.C.A.) In prosecution under Comp. Laws Territory Alaska 1913, § 266, for wantonly wasting and destroying salmon taken in waters of Alaska on July 30, 1913, where court required prosecution to elect to prove offense as of July 28th, evidence of defendant's acts before and after that day was admissible.—Alaska Packers' Ass'n v. United States, 158.

(G) Necessity, Requisites, and Sufficiency of Instructions.

⚷780(3) (U.S.C.C.A.) As Rev. Laws Okl. 1910, § 5884, does not apply to prosecution in federal court for introducing intoxicating liquors into Oklahoma, *held*, that instruction that testimony of witness, if an accomplice, should be scrutinized, sufficiently protected accused's rights.—Bandy v. United States, 394.

⚷789(4) (U.S.C.C.A.) In prosecution for violating Act Cong. Feb. 9, 1909, c. 100, as amended by Act Jan. 17, 1914, c. 9, §§ 2, 3, by concealing, etc., smoking opium, *held*, that instructions were not misleading, as allowing jury to convict, though accused's guilt was not established beyond reasonable doubt.—Ng Choy Fong v. United States, 497.

⚷823(9) (U.S.C.C.A.) Charge in prosecution for introducing intoxicating liquors into Oklahoma *held* not erroneous, as placing burden on defendant, in view of charge on reasonable doubt.—Bandy v. United States, 394.

(H) Requests for Instructions.

⚷825(1) (U.S.C.C.A.) Instructions given on the trial of a defendant charged with using the mails to defraud *held* proper and sufficient, in the absence of request for more specific instructions.—Ridell v. United States, 143.

(L) Waiver and Correction of Irregularities and Errors.

⚷901 (U.S.C.C.A.) Defendant's motion, at the conclusion of the prosecution's evidence, to dismiss, was waived by introduction of evidence on his behalf, and by his failure to move for an instructed verdict at close of the evidence.—Clark v. United States, 408.

XIII. MOTIONS FOR NEW TRIAL AND IN ARREST.

⚷931 (U.S.C.C.A.) Where defendant contended that juror during course of trial asked whether he would take the stand, and based upon such occurrences a claim of unfairness on part of jury, defendant, having failed to call matter to court's attention before verdict, is not entitled to do so thereafter.—Bowers v. United States, 89.

XIV. JUDGMENT, SENTENCE, AND FINAL COMMITMENT.

⚷979(2) (U.S.C.C.A.) The court does not lose jurisdiction to impose sentence after the trial term, postponements being unconditional and for definite periods, and for a purpose incident to the administration of justice within the court's power.—Miner v. United States, 48.

XV. APPEAL AND ERROR, AND CERTIORARI.

(A) Form of Remedy, Jurisdiction, and Right of Review.

⚷1023(13) (U.S.C.C.A.) The Circuit Court of Appeals cannot review denial of defendant's motion for new trial.—Clark v. United States, 408.

(B) Presentation and Reservation in Lower Court of Grounds of Review.

⚷1054(1) (U.S.C.C.A.) Rulings in admitting and refusing to strike evidence cannot be reviewed; exceptions not having been taken thereto.—Clark v. United States, 408.

(E) Assignment of Errors and Briefs.

⚷1129(1) (U.S.C.C.A.) Exception to charge, though not properly assigned as error, may be considered in case involving personal liberty.—Bandy v. United States, 394.

⚷1129(2) (U.S.C.C.A.) Assignments of error, framed in disregard of rules of Circuit Court of Appeals, may be disregarded.—Bandy v. United States, 394.

⚷1129(3) (U.S.C.C.A.) Assignment of error, complaining of admission of evidence which did not set forth the evidence admitted, presents nothing for review.—Bandy v. United States, 394.

Assignments of error, complaining of instructions, which did not set forth instructions complained of, present nothing for review.—Id.

(G) Review.

⚷1144(17) (U.S.C.C.A.) Regarding jurisdiction to impose sentence after the trial term, it will be presumed on appeal that postponements were for a lawful purpose.—Miner v. United States, 48.

⚷1159(3) (U.S.C.C.A.) Conviction on conflicting evidence will not be disturbed on writ of error.—Bandy v. United States, 394.

⚷1160 (U.S.C.C.A.) Where there were conflicting affidavits relating to defendant's claim of unfairness on part of jury, matter cannot be reviewed on error, having been decided adversely to defendant by trial court's denying new trial.—Bowers v. United States, 89.

⚷1169(5) (U.S.C.C.A.) Secondary evidence of contents of two telegrams *held* not reversible error, where latter was stricken out because government was unable to make preliminary proofs.—Simpson v. United States, 470.

⚷1178 (U.S.C.C.A.) Assignments of error, not argued, are waived.—Bandy v. United States, 394.

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(H) Determination and Disposition of Cause.

⚷1186(4) (U. S. C. C. A.) Rev. St. § 1025 (Comp. St. 1916, § 1691), providing for nonobservance of imperfections of indictment in matter of form not prejudicing defendant, authorizes observance of dictates of common sense.—Whitehead v. United States, 547.

CROSSINGS.

See Railroads, ⚷344, 350.

DAMAGES.

See Appeal and Error, ⚷719; Eminent Domain.

VIII. PLEADING, EVIDENCE, AND ASSESSMENT.

(B) Evidence.

⚷176 (U.S.C.C.A.) Evidence as to profit in handling and marketing slag at another point *held* not admissible to show plaintiffs' loss of profits from defendant's breach of contract to let plaintiffs have slag for keeping it out of defendant's way.—Davis v. Carnegie Steel Co., 281.

⚷190 (U.S.C.C.A.) Evidence as to value of crushed slag *held* insufficient to support recovery for loss of profits, under agreement whereby plaintiffs were to have slag for keeping it out of defendant's way, without evidence of cost of crushing and marketing the slag.—Davis v. Carnegie Steel Co., 281.

Evidence of value of slag in dumps *held* not to support recovery for loss of profits, in absence of evidence as to what it would have cost plaintiffs to keep the slag out of defendant's way as agreed.—Id.

Evidence of price quoted by defendant on slag *held* insufficient to support recovery for loss of profits under agreement that plaintiffs could have the slag for keeping it out of defendant's way.—Id.

DEATH.

See Partnership; Railroads, ⚷344, 401.

II. ACTIONS FOR CAUSING DEATH.

(A) Right of Action and Defenses.

⚷27 (U.S.C.C.A.) Under Rem. & Bal. Code Wash. §§ 183, 194, where plaintiff in action for injuries died from the injuries, and his widow was substituted, *held*, that judgment did not bar an action for the death.—Puget Sound Traction, Light & Power Co. v. Frescoln, 493.

DEBTOR AND CREDITOR.

See Bankruptcy.

DECEDENTS.

See Executors and Administrators.

DECEIT.

See Fraud.

DEEDS.

See Homestead, ⚷118; Mortgages.

DELAY.

See Principal and Surety; Waters and Water Courses, ⚷249.

DEMURRAGE.

See Shipping.

DEMURRER.

See Pleading, ⚷193, 214.

DEPORTATION.

See Aliens, ⚷31, 32.

DEPUTIES.

See United States Marshals.

DEROGATION OF MARRIAGE.

See Contracts, ⚷111.

DESCENT AND DISTRIBUTION.

See Executors and Administrators; Perpetuities; Wills.

II. PERSONS ENTITLED AND THEIR RESPECTIVE SHARES.

(B) Surviving Husband or Wife.

⚷52(2) (U.S.C.C.A.) Where land mortgaged by husband alone was sold on judicial sale before his death, his widow will not, under Gen. St. Minn. 1913, § 7238, relating to descent and distribution, take any interest therein.—Graham v. National Surety Co., 264.

DETENTION.

See Aliens, ⚷23.

DIRECTING VERDICT.

See Appeal and Error, ⚷927; Dismissal and Nonsuit.

DISCHARGE.

See Accord and Satisfaction; Guaranty; Principal and Surety; Release.

DISCOVERY.

I. IN EQUITY.

⚷9 (U.S.C.C.A.) A bill of discovery in aid of a defense at law cannot be maintained where complainant has ample proof of his allegations and the evidence sought is plainly cumulative or comparatively unimportant.—Galion Iron Works Co. v. Ohio Corrugated Culvert Co., 53.

⚷19 (U.S.C.C.A.) It is essential that a bill of discovery disclose a substantial necessity for the relief.—Galion Iron Works Co. v. Ohio Corrugated Culvert Co., 53.

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DISCRETION OF COURT.

See Bankruptcy, ⟹264, 446; Pleading, ⟹236, 339; Receivers, ⟹35.

DISMISSAL AND NONSUIT.

See Action.

I. VOLUNTARY.

⟹30 (U.S.C.C.A.) Plaintiff was not as matter of right entitled to voluntary nonsuit after court had decided to direct verdict for defendant.—Barrett v. Virginian Ry. Co., 23.

DISORDERLY HOUSE.

⟹2 (U.S.C.C.A.) Power to regulate and suppress brothels is police in its character, and is one to be exercised by states, rather than by federal government.—Katz v. Commissioner of Immigration at Port of San Francisco, Cal., 508.

⟹17 (U.S.C.C.A.) Proof of ownership of a disorderly house cannot be made by proof of general reputation.—Katz v. Commissioner of Immigration at Port of San Francisco, Cal., 508.

DISSOLUTION.

See Corporations, ⟹603, 610.

DISTRICT AND PROSECUTING ATTORNEYS.

⟹6(1) (U.S.C.C.A.) A United States attorney *held* not to have the right to accept private compensation for services rendered as counsel for the receiver appointed in a suit by the United States (Rev. St. § 771 [Comp. St. 1916, § 1296]).—McPherson v. United States, 331.

DIVERSE CITIZENSHIP.

See Courts, ⟹405.

DIVIDENDS.

See Bankruptcy, ⟹359; Banks and Banking, ⟹77.

DOCKETS.

See Action.

DRUGGISTS.

See Poisons.

DUE PROCESS OF LAW.

See Constitutional Law, ⟹266, 301.

ELECTION.

See Criminal Law, ⟹678.

EMINENT DOMAIN.

I. NATURE, EXTENT, AND DELEGATION OF POWER.

⟹2(1) (U.S.C.C.A.) Railroad company by relocating road *held* not to take, injure, or destroy property near the old location, within Const. Ala. 1901, § 235.—Bryan v. Louisville & N. R. Co., 98.

II. COMPENSATION.

(C) Measure and Amount.

⟹122 (U.S.C.C.A.) Just compensation means the full equivalent for the property taken.—Kanakanui v. United States, 273.

III. PROCEEDINGS TO TAKE PROPERTY AND ASSESS COMPENSATION.

⟹167(1) (U.S.C.C.A.) The provision of Act Aug. 18, 1890, c. 797, § 1, that proceedings for the condemnation of property for military purposes shall be prosecuted in accordance with the laws of the states wherever they are instituted, applies only to matters of procedure.—Kanakanui v. United States, 273.

⟹246(2) (U.S.C.C.A.) The institution and prosecution by the United States of a proceeding for the condemnation of property is not a taking of the property, and the proceeding may be abandoned at any time.—Kanakanui v. United States, 273.

⟹246(4) (U.S.C.C.A.) Rev. Laws Hawaii 1905, § 505, providing for the recovery by defendant of expenses and damages on abandonment of condemnation proceedings, does not apply to proceedings by the United States, which is not liable for such incidental damages.—Kanakanui v. United States, 273.

EMPLOYERS' LIABILITY ACTS.

See Master and Servant, ⟹204.

ENCROACHMENT.

See Constitutional Law, ⟹70.

EQUITABLE ESTOPPEL.

See Estoppel.

EQUITY.

See Action; Cancellation of Instruments; Courts, ⟹262; Discovery; Injunction; Patents, ⟹326; Receivers; Subrogation.

IV. PLEADING.

(A) Original Bill.

⟹148(1) (U.S.C.C.A.) Court below, under Alaska statute, had discretion to permit joinder of causes of action for diminishing assets of bank by permitting subscribers to surrender stock and for declaring illegal dividend.—Jesson v. Noyes, 342.

EQUITY RULES.

See Court Rules Cited.

ERROR, WRIT OF.

See Appeal and Error.

ESPIONAGE ACT.

See Appeal and Error, ⟹458.

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ESTATES.

See Descent and Distribution; Executors and Administrators; Perpetuities; Wills.

ESTOPPEL.

See Appeal and Error, ⚷162; Bankruptcy, ⚷185, 359; Bills and Notes, ⚷113; Indemnity; Judgment; Release, ⚷16; Sales.

III. EQUITABLE ESTOPPEL.

(B) Grounds of Estoppel.

⚷93(4) (U.S.C.C.A.) That plaintiffs allowed defendant, without right, to construct railroad over their lands, and for considerable time acquiesced in its operation, *held* not to estop them from subsequently enjoining operation and compelling removal; defendant not being a common carrier.—Plazuela Sugar Co. v. Pastoriza, 411.

EVIDENCE.

See Criminal Law, ⚷371–491; Discovery; Witnesses.

For evidence as to particular facts or issues or in particular actions or proceedings, see also the various specific topics.

For review of rulings relating to evidence, see Appeal and Error.

Reception at trial, see Criminal Law, ⚷678.

I. JUDICIAL NOTICE.

⚷35 (U.S.C.C.A.) District Court of Alaska may take judicial notice of statutes of a state. —Jesson v. Noyes, 342.

IX. HEARSAY.

⚷317(6) (U.S.C.C.A.) Evidence as to profit in handling and marketing slag, based on inquiries, *held* properly excluded as secondhand information.—Davis v. Carnegie Steel Co., 281.

XI. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS.

(D) Construction or Application of Language of Written Instrument.

⚷451 (U.S.C.C.A.) Parol evidence is not admissible to explain patent ambiguity in a deed. —Graham v. National Surety Co., 264.

⚷452 (U.S.C.C.A.) Parol evidence is admissible to explain latent ambiguity in deed.—Graham v. National Surety Co., 264.

⚷462 (U.S.C.C.A.) Parol evidence *held* admissible to show scope of deed of trust as to defendant wife, it appearing that she refused to sign deed of trust upon homestead which would cover past indebtedness of her husband's firm.—Graham v. National Surety Co., 264.

XII. OPINION EVIDENCE.

(D) Examination of Experts.

⚷553(2) (U.S.C.C.A.) In framing hypothetical questions to expert witnesses, party may disregard his adversary's theory and apply only his own.—City of Port Washington v. Thacher, 390.

EXAMINATION.

See Evidence, ⚷553.

EXCEPTIONS.

See Criminal Law, ⚷1054.

EXCEPTIONS, BILL OF.

II. SETTLEMENT, SIGNING, AND FILING.

⚷53(3) (U.S.C.C.A.) Right to mandamus to compel settlement of bill of exceptions considered.—Black v. Youmans, 622.

EXCLUSION.

See Aliens, ⚷23–32.

EXECUTION.

See Attachment; Homestead.

X. SUPPLEMENTARY PROCEEDINGS.

⚷409 (U.S.C.C.A.) While a receiver in supplementary proceedings may not, by virtue of his appointment, acquire title to patents so as to enable him to execute a valid assignment to a purchaser, a court of equity has power to order such assignments made by the proper person.—Inventions Corp. v. Hobbs, 56.

EXECUTORS AND ADMINISTRATORS.

See Descent and Distribution; Wills.

VI. ALLOWANCE AND PAYMENT OF CLAIMS.

(A) Liabilities of Estate.

⚷206(4) (U.S.C.C.A.) In an action on a quantum meruit to recover for services rendered deceased, who breached oral agreement to devise unenforceable under statute of frauds, *held* that plaintiff could only recover value of such services, but in computing it financial condition, etc., of deceased should be considered.—Quirk v. Bank of Commerce & Trust Co., 130.

EXEMPTIONS.

See Homestead; Shipping.

FACTORS.

See Principal and Agent.

FEDERAL COURTS.

See Courts, ⚷259–407.

FEDERAL EMPLOYERS' LIABILITY ACTS.

See Master and Servant, ⚷204.

FEDERAL QUESTIONS.

See Courts, ⚷282.

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FINAL JUDGMENT.

See Appeal and Error, ⟹78.

FINDINGS.

See Appeal and Error, ⟹1008–1010.

FIRES.

See Salvage, ⟹31.

FISH.

⟹15 (U.S.C.C.A.) Under indictment under Comp. Laws Territory Alaska 1913, § 266, for wantonly wasting and destroying salmon taken in waters of Alaska, alleging an offense on July 30, 1913, a conviction for offense on July 28th, the day on which the government elected to prove the offense, would not be reversed because of a variance.—Alaska Packers' Ass'n v. United States, 158.

FIXTURES.

⟹22 (U.S.C.C.A.) Mill machinery sold under contract of conditional sale and attached only by bolts and screws, and which could be removed without injury to the mill, was not a fixture which under L. O. L. § 7414, could not be removed.—Meyer v. Pacific Machinery Co., 178.

FOG.

See Collision.

FOREIGN CORPORATIONS.

See Railroads, ⟹33.

FOREIGNERS.

See Aliens.

FOREIGN JUDGMENTS.

See Judgment, ⟹817–822.

FORFEITURES.

See Public Lands.

FORGERY.

See Bills and Notes, ⟹113.

FORNICATION.

See Prostitution.

FRAUD.

See Cancellation of Instruments, ⟹17, 43; Criminal Law, ⟹155, 371, 410, 491; Frauds, Statute of; Pleading, ⟹214; Post Office, ⟹48–50; Principal and Agent; Public Lands; Trial, ⟹296.

I. DECEPTION CONSTITUTING FRAUD, AND LIABILITY THEREFOR.

⟹7 (U.S.C.C.A.) A party to a transaction, by pleading ignorance and inexperience and declaring her reliance on the other party, cannot impose a fiduciary obligation or status on such other party, unless consented to.—Southern Trust Co. v. Lucas, 478.

⟹11(2) (U.S.C.C.A.) A statement as to value, when intended to be treated as an important factor inducing action, and made with knowledge that it will be accepted as a basis of action, *held* a statement of fact.—Southern Trust Co. v. Lucas, 478.

⟹23 (U.S.C.C.A.) Trust company, which negotiated exchange of properties between plaintiff and one of its clients, having proceeded so as to justify plaintiff in believing that it was caring for her interests, *held* bound to do so.—Southern Trust Co. v. Lucas, 478.

FRAUDS, STATUTE OF.

V. AGREEMENTS NOT TO BE PERFORMED WITHIN ONE YEAR OR DURING LIFETIME.

⟹44(1) (U.S.C.C.A.) A contract for placing of insurance on vessels for two years *held* not one to be performed within a year.—Harper Transp. Co. v. Johnson & Higgins, 286.

⟹50(1) (U.S.C.C.A.) A contract is not invalid under the statute of frauds because the contingency on which it is based may not happen within one year, it being possible for it to happen within that time.—Quirk v. Bank of Commerce & Trust Co., 130.

VI. REAL PROPERTY AND ESTATES AND INTERESTS THEREIN.

⟹63(1) (U.S.C.C.A.) Agreement to give furnace slag to plaintiffs for keeping it out of the way *held* either a grant of, or contract for, an interest in lands, within Gen. Code Ohio, §§ 8620, 8621, or a sale of personalty, under sections 8456, 8384.—Davis v. Carnegie Steel Co., 281.

⟹72(1) (U.S.C.C.A.) Agreement to give furnace slag to plaintiffs for keeping it out of the way *held* either a grant of, or contract for, an interest in lands, within Gen. Code Ohio, §§ 8620, 8621, or a sale of personalty, under sections 8456, 8384.—Davis v. Carnegie Steel Co., 281.

⟹75 (U.S.C.C.A.) An oral contract to devise real estate is within the statute of frauds.—Quirk v. Bank of Commerce & Trust Co., 130.

VII. SALES OF GOODS.

(A) Contracts Within Statute.

⟹82 (U.S.C.C.A.) Agreement to give furnace slag to plaintiffs for keeping it out of the way *held* either a grant of, or contract for, an interest in lands, within Gen. Code Ohio, §§ 8620, 8621, or a sale of personalty, under sections 8456, 8384.—Davis v. Carnegie Steel Co., 281.

⟹83 (U.S.C.C.A.) Agreement to give slag to plaintiffs for keeping it out of the way *held* not a contract to manufacture, though a slag-crushing plant was to be furnished plaintiffs.—Davis v. Carnegie Steel Co., 281.

(B) Acceptance of Part of Goods.

⟹90(1) (U.S.C.C.A.) Under Gen. Code Ohio, § 8384, subsecs. 1, 3, acceptance of goods, with-

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HOMESTEAD.

See Mortgages, ⚷114.

II. TRANSFER OR INCUMBRANCE.

⚷115(1) (U.S.C.C.A.) Deed of trust *held* not to apply to homestead of defendant wife in so far as it covered past indebtedness of her husband.—Graham v. National Surety Co., 264.

⚷118(5) (U.S.C.C.A.) Under Gen. St. Minn. 1913, § 6961, a conveyance by a husband or wife without the spouse joining is void as to the homestead though it may be valid as to other property included therein.—Graham v. National Surety Co., 264.

HOURS OF SERVICE.

See Master and Servant.

HUSBAND AND WIFE.

See Descent and Distribution.

VII. COMMUNITY PROPERTY.

⚷268(6) (U.S.C.C.A.) Indemnity liability incurred by husband *held* not charge against community property; husband's voluntary act in executing indemnity agreement having resulted in no benefit to community.—American Surety Co. of New York v. Sandberg, 149.

HYPOTHETICAL QUESTIONS.

See Evidence, ⚷553.

IDENTITY.

See Patents, ⚷234.

IMITATION.

See Trade-Marks and Trade-Names, ⚷59, 70.

IMMIGRATION.

See Aliens, ⚷51, 54.

IMPAIRING OBLIGATION OF CONTRACT.

See Constitutional Law, ⚷129.

IMPEACHMENT.

See Release, ⚷16; Witnesses.

IMPRISONMENT.

See Habeas Corpus.

IMPROVEMENTS.

See Patents, ⚷174.

INDEMNITY.

See Guaranty; Husband and Wife; Principal and Surety.

⚷14 (U.S.C.C.A.) An adjudication that a vessel was in fault for a collision because of the place and manner of her anchorage is conclusive of such fact in a subsequent suit by the vessel against her pilot to charge him with responsibility therefor.—Strathleven Steamship Co. v. Baulch, 38.

That a vessel in a suit for collision unsuccessfully contended that she was not in fault does not estop her from alleging such fault in a subsequent suit to charge her pilot with responsibility therefor.—Id.

⚷15(4) (U.S.C.C.A.) Fact that at time of signing agreement of indemnity indemnitor was himself indemnified against loss does not affect nature of his suretyship, or change its character from that of voluntary act of accommodation.—American Surety Co. of New York v. Sandberg, 149.

INDIANS.

⚷1 (U.S.C.C.A.) In a suit to establish plaintiff's right to an allotment of land in the White Earth Indian Reservation, evidence *held* to show that plaintiff was by blood a member of a band of the Chippewa Indians of Lake Superior.—Vezina v. United States, 573.

Under 30 Stat. 90, child of white man and Indian woman, recognized as a member of a band of Indians, *held* entitled to be treated as a member of such band, though not remaining on the reservation.—Id.

⚷16(3) (U.S.C.C.A.) The death of a minor Creek allottee *held*, under Act May 27, 1908, c. 199, § 9, to terminate all control by the Secretary of the Interior over the land, including an oil lease previously made with his approval, and the royalties accrued and accruing thereunder.—Richard v. Parker, 522.

INDICTMENT AND INFORMATION.

See Courts, ⚷374; Criminal Law, ⚷155; Post Office, ⚷48.

V. REQUISITES AND SUFFICIENCY OF ACCUSATION.

⚷110(3) (U.S.C.C.A.) Indictment for violation of White Slave Act, § 3, in language of statute, *held* sufficient.—Simpson v. United States, 470.

IX. ISSUES, PROOF, AND VARIANCE.

⚷176 (U.S.C.C.A.) Under indictment under Comp. Laws Territory Alaska 1913, § 266, alleging that on July 30, 1913, defendant wantonly wasted and destroyed salmon taken in waters of Alaska, prosecution was not bound to prove commission of offense on that day.—Alaska Packers' Ass'n v. United States, 158.

INFANTS.

See Indians.

INFORMATION.

See Indictment and Information.

INFRINGEMENT.

See Patents, ⚷232–326; Trade-Marks and Trade-Names, ⚷59.

INHERITANCE.

See Descent and Distribution.

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mise, never carried out and ineffective.—Jones v. Pettingill, 461.

XVII. FOREIGN JUDGMENTS.

⚷817 (U.S.C.C.A.) Ohio court *held* bound to enforce Pennsylvania judgment on cognovit note, though providing for an attorney's fee included in the judgment, contrary to the public policy of Ohio.—Westwater v. Murray, 589.

⚷818(6) (U.S.C.C.A.) In action on foreign judgment, court's jurisdiction over defendant may be inquired into; but such inquiry involves all the usual tests for determining such jurisdiction.—Westwater v. Murray, 589.

⚷822(3) (U.S.C.C.A.) Foreign judgment on cognovit note, executed in settlement of an action on a note, *held* conclusive against the claim that the original note was a forgery.—Westwater v. Murray, 589.

JUDICIAL NOTICE.

See Evidence, ⚷35.

JUDICIAL POWER.

See Constitutional Law, ⚷70.

JURISDICTION.

See Admiralty; Courts; Habeas Corpus; Judgment, ⚷818.

JURY.

See Criminal Law, ⚷931; Trial, ⚷139.

LACHES.

See Bills and Notes, ⚷113.

LANDS.

See Public Lands.

LAST CLEAR CHANCE DOCTRINE.

See Negligence, ⚷83; Railroads, ⚷344, 350, 401.

LATENT AMBIGUITY.

See Evidence, ⚷452.

LEASE.

See Indians.

LEAVE OF COURT.

See Pleading, ⚷236.

LETTERS.

See Witnesses, ⚷220.

LEWDNESS.

See Prostitution.

LICENSES.

See Railroads, ⚷65.

LIENS.

See Bankruptcy, ⚷245; Salvage, ⚷48; Seamen, ⚷28; Shipping.

LIMITATION OF ACTIONS.

See Criminal Law, ⚷155; Wills, ⚷68.

I. STATUTES OF LIMITATION.

(B) Limitations Applicable to Particular Actions.

⚷34(1) (U.S.C.C.A.) South Dakota statute of limitations (Code Civ. Proc. S. D. § 60), declaring that it includes action on liability created by statute, other than penalty of forfeiture, applies to action created by statute, though liability is in nature of specialty.—Chicago & N. W. Ry. Co. v. Ziebarth, 526.

LIMITATION OF CLAIMS.

See Patents, ⚷174, 176.

LIS PENDENS.

See Abatement and Revival.

LITERARY PROPERTY.

⚷1 (U.S.C.C.A.) News, although not literary property, where it has a commercial value, is property, and as such entitled to legal protection.—Associated Press v. International News Service, 436.

LOCOMOTIVES.

See Master and Servant, ⚷110.

MAIL.

See Appeal and Error, ⚷458; Courts, ⚷405; Criminal Law, ⚷155; Post Office.

MAINTENANCE.

See Champerty and Maintenance.

MANDAMUS.

I. NATURE AND GROUNDS IN GENERAL.

⚷16(1) (U.S.C.C.A.) Under Act Oct. 22, 1913, c. 32, mandamus will not issue for reinstatement of deputy marshal not required to give a bond, as the marshal could avoid the writ by demanding bond and then revoking the appointment.—United States v. Lapp, 3.

II. SUBJECTS AND PURPOSES OF RELIEF.

(B) Acts and Proceedings of Public Officers and Boards and Municipalities.

⚷76 (U.S.C.C.A.) Mandamus will not issue to control discretion of United States marshal in removing deputy marshal under Act Oct. 22, 1913, c. 32.—United States v. Lapp, 3.

MANN ACT.

See Indictment and Information; Prostitution.

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not to board such train *held* misleading under the evidence.—Heskett v. Pennsylvania Co., 518.

IV. LIABILITIES FOR INJURIES TO THIRD PERSONS.

(C) Actions.

⚷328 (U.S.C.C.A.) A joint action cannot be maintained against a master and servant for an injury and death occurring in Ohio, where the master's liability arises solely under the doctrine of respondeat superior.—Robbins v. Pennsylvania Co., 597.

MEDICINES.

See Poisons; Trade-Marks and Trade-Names, ⚷59.

MEMORANDA.

See Frauds, Statute of, ⚷113.

MINES AND MINERALS.

I. PUBLIC MINERAL LANDS.

(B) Location and Acquisition of Claims.

⚷36 (U.S.C.C.A.) The United States *held*, on the evidence, not entitled to recover oil placer mining claims under Rev. St. §§ 2329–2333 (Comp. St. 1916, §§ 4628–4632), and Act Feb. 12, 1903, c. 548, on which development work was being diligently prosecuted at the time of the withdrawal proclamation of September 27, 1909 and Act June 25, 1910, c. 421, § 2, although no discovery had at that time been made.—Consolidated Mut. Oil Co. v. United States, 633.

III. OPERATION OF MINES, QUARRIES, AND WELLS.

(B) Mining Partnerships and Companies.

⚷105(2) (U.S.C.C.A.) Under Comp. Laws Utah, 1876, p. 232, which became Const. Utah, art. 12, § 1, *held*, that directors of a mining company, incorporated before passage of act of 1905 (Comp. Laws, 1907, § 322), might, with concurrence of shareholders, dispose of entire property.—Geddes v. Anaconda Copper Mining Co., 417.

MINORS.

See Indians.

MISJOINDER.

See Pleading, ⚷193, 352.

MISREPRESENTATION.

See Fraud.

MISTAKE.

See Release, ⚷16.

MONOPOLIES.

II. TRUSTS AND OTHER COMBINATIONS IN RESTRAINT OF TRADE.

⚷12(1) (U.S.C.C.A.) A concern which is going out of business as a losing one may, without violating the Sherman Anti-Trust Law, sell its plant to its only competitor, instead of scrapping it; the buyer being required to continue fair dealing with the public.—American Press Ass'n v. United States, 387.

⚷23 (U.S.C.C.A.) Minority shareholders of company owning copper mining property *held* not entitled to attack sale of the property to defendant, on ground that defendant was attempting to acquire a monopoly of copper mining business in violation of Sherman Anti-Trust Act.—Geddes v. Anaconda Copper Mining Co., 417.

MORTGAGES.

See Bankruptcy, ⚷160, 172, 272; Descent and Distribution; Homestead, ⚷115.

III. CONSTRUCTION AND OPERATION.

(B) Parties and Debts or Liabilities Secured.

⚷114 (U.S.C.C.A.) In view of Gen. St. Minn. 1913, § 7907, *held*, that trust deed executed by husband and wife to secure husband's surety covered past indebtedness of husband as to lands other than homestead though it did not as to the homestead.—Graham v. National Surety Co., 264.

VII. PAYMENT OR PERFORMANCE OF CONDITION, RELEASE, AND SATISFACTION.

⚷310 (U.S.C.C.A.) Under a declaration of trust, pursuant to which an owner of land conveyed the same to a trustee, to be released after subdivision into lots and conveyances by the beneficiary, *held*, that expenditure in subdividing and improving by the beneficiary was not a condition precedent to his right to sell lots and release thereof by the trustee.—United Real Estate & Trust Co. v. Blochman, 136.

Where a declaration of trust, pursuant to which an owner of land conveyed the same to a trustee on part payment of the price by the purchaser, was equivocal, the doubt must be resolved in favor of the trustee; the instrument having been prepared by the vendor.—Id.

Under a stipulation of a trust deed whereby vendor conveyed land to a trustee, to hold until payment of the balance of the price, *held*, that actual sale by the beneficiary was not a condition precedent to the power of the trustee to release lots; the payment of the stipulated price per lot being all that was necessary.—Id.

Under declaration of trust whereby vendor conveyed land to a trustee on payment of part of a price, conditioned that the trustee might release lots sold by the beneficiary on payment of specified sums per lot, *held*, that releases by the trustee could be made on the stipulated payments, though there were overdue installments of the price owing by the beneficiary.—Id.

Where the vendor, which conveyed to a trustee, who was given power to release lots on specified payments being made, received such specified payments and authorized the releases, it could not thereafter hold the money and deny the trustee's authority to release.—Id.

Though antagonism had developed between the vendor and trustee under a deed of trust made

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to secure payment of the balance of the purchase price, it was not error to permit such trustee to sell the property on default of payments, where the vendor's interests were properly safeguarded by court's order, under which the trustee was authorized to perform only ministerial functions.—Id.

MOTIONS.

See Pleading, ⚷193, 352.

MULTIFARIOUSNESS.

See Equity.

MUNICIPAL CORPORATIONS.

See Poisons, ⚷2.

NAMES.

See Trade-Marks and Trade-Names.

NATIONAL BANKS.

See Banks and Banking, ⚷257, 262.

NATURALIZATION.

See Aliens, ⚷71½.

NAVIGABLE WATERS.

I. RIGHTS OF PUBLIC.

⚷1(1) (U.S.C.C.A.) Stream flowing through marsh or tidelands, never used or regarded as navigable except for small boats, and which it was impracticable to use without deepening it, *held* not a navigable stream.—North American Dredging Co. of Nevada v. Mintzer, 489.

⚷23 (U.S.C.C.A.) Whether the anchorage of a vessel in a navigable channel is in violation of Act March 3, 1899, c. 425, § 15, as preventing or obstructing the passage of other vessels, depends upon the facts of the particular case.—Strathleven Steamship Co. v. Baulch, 38.

II. LANDS UNDER WATER.

⚷37(7) (U.S.C.C.A.) Under grant of tidelands intersected by tidal sloughs, title to the soil underlying such stream *held* in the grantees, whether or not the stream was navigable.—North American Dredging Co. of Nevada v. Mintzer, 489.

III. RIPARIAN AND LITTORAL RIGHTS.

⚷44(3) (U.S.C.C.A.) After river changed its channel to new route, center line of old channel *held* to become fixed and unvarying boundary between contiguous subdivisions of land, and not changed by gradual and imperceptible accretions.—A. G. Wineman & Sons v. Reeves, 446.

NAVIGATION.

See Navigable Waters.

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OBSTRUCTIONS.

See Navigable Waters, ⚷23.

OFFICERS.

See Accord and Satisfaction; Banks and Banking, ⚷257, 262; Corporations, ⚷182, 318; District and Prosecuting Attorneys; Mandamus; Receivers; United States Marshals.

I. APPOINTMENT, QUALIFICATION, AND TENURE.

(A) Offices, and Power to Appoint to and Remove from Office.

⚷7 (U.S.C.C.A.) In the absence of constitutional or statutory regulations, the power of appointment carries with it, as an incident, the power to remove when no definite term is attached to the office by law.—United States v. Lapp, 3.

When an appointee holds an office at the will and discretion of his superior having the power of appointment, he is subject to removal at pleasure.—Id.

OIL.

See Indians; Mines and Minerals, ⚷36.

OPINION EVIDENCE.

See Criminal Law, ⚷491; Evidence, ⚷553.

OPIUM.

See Constitutional Law, ⚷266; Criminal Law, ⚷789; Poisons, ⚷2.

PAROL EVIDENCE.

See Evidence, ⚷451–462.

PARTIES.

For parties to particular proceedings or instruments, see the various specific topics.

For parties on appeal and review of rulings as to parties, see Appeal and Error.

PARTNERSHIP.

IV. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

(D) Actions by or Against Firms or Partners.

⚷203 (U.S.C.C.A.) In action on contract made with plaintiffs as partners, where one died, action *held* properly permitted, to proceed in the name of the survivor, under Rev. St. §§ 955, 956 (Comp. St. 1916, §§ 1592, 1593).—Jones v. Pettingill, 461.

PATENT AMBIGUITY.

See Evidence, ⚷451.

PATENTS.

See Corporations, ⚷548.

II. PATENTABILITY.

(A) Invention.

⚷27(1) (U.S.C.C.A.) It is usually true that the observation and the imagination of the inventor are required to make adaptation from one art to another.—Foster v. T. L. Smith Co., 296.

IX. CONSTRUCTION AND OPERATION OF LETTERS PATENT.

(B) Limitation of Claims.

⚷174 (U.S.C.C.A.) Though it be conceded to be a close question whether invention was involved in adding another element to an existing combination, yet, if invention is found, this concession does not lead to any particularly narrow construction.—Westinghouse Mach. Co. v. C. & G. Cooper Co., 625.

⚷176 (U.S.C.C.A.) The word "simultaneous," as used in patent claim, does not imply absolute synchronism from beginning to end, but has some elasticity. Events may be substantially or relatively simultaneous, although not absolutely.—Westinghouse Mach. Co. v. C. & G. Cooper Co., 625.

XII. INFRINGEMENT.

(A) What Constitutes Infringement.

⚷232 (U.S.C.C.A.) A defendant, having used the steps of a patented process until, if it stopped there, it would produce the result of the patent, cannot avoid infringement by taking an additional step, even though that step, if taken alone, avoids the patent.—Miami Copper Co. v. Minerals Separation, Limited, 200.

⚷234 (U.S.C.C.A.) Infringement is not avoided by changes in the mechanism of the patented device, so as not to literally conform to the language of the claims, if the defendant has appropriated the real substance of the invention.—Foster v. T. L. Smith Co., 296.

(C) Suits in Equity.

⚷326(1) (U.S.C.C.A.) Where the modification of a machine, after a decree and injunction against the original machine as an infringement, is merely colorable, the matter may be dealt with in a proceeding for contempt.—Frank F. Smith Metal Window Hardware Co. v. Yates, 241.

⚷326(2) (U.S.C.C.A.) A defendant cannot avoid the consequences of violating an injunction against infringement by doing so through the agency of a corporation organized by him.—Frank F. Smith Metal Window Hardware Co. v. Yates, 241.

XIII. DECISIONS ON THE VALIDITY, CONSTRUCTION, AND INFRINGEMENT OF PARTICULAR PATENTS.

⚷328.

UNITED STATES.

ORIGINAL.

632,361. Pattern for garments, held void.. 84
758,677. Draft-rigging for railway cars, held not infringed..... 541
802,206. Tool holder, held not infringed.. 244
803,721. Concrete mixer, held not anticipated, valid, and infringed, except claim 5..... 296
818,159. Stop motion for high speed machines, held not infringed..... 72

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829,728. Draft-rigging for railway held not infringed.....
835,120. Process of concentrating claims 1 and 12, held inf
858,746. Draft-rigging for railway held not infringed.....
921,864. Valve motion for gas m claim 5 held void, claims and 8 held not anticipated, and infringed.....
962,678. Process of concentrating held not anticipated and claims 1, 2, 5, and 6, he fringed .....
1,099,699. Process of concentrating held not anticipated, vali infringed .....

PAYMENT.

See Accord and Satisfaction; Appea ror, ⚷162; Bankruptcy, ⚷164, promise and Settlement; Subrogat

I. REQUISITES AND SUFFICI

⚷21 (U.S.C.C.A.) Receipt of draft tiff, who was trying to collect certific posit, payment of which defendant g *held* not acceptance of draft in pay cluding recovery from defendant o honor.—Royal Indemnity Co. v. Beis

PENALTIES.

See Master and Servant; Pleading,

PENDENCY OF ACTIO

See Abatement and Revival.

PERPETUITIES.

⚷8(1) (U.S.C.C.A.) Bequests of trust, the income to be paid over ann devoted to a public charity, *held* n under the rule against perpetuities.— Myers, 252.

PERSONAL INJURIES.

See Master and Servant, ⚷107–29 gence; Railroads, ⚷344–401; Rel 16–57; Seamen, ⚷29; Trial, ⚷

PERSONAL PROPERTY

See Property.

PLEA.

See Criminal Law, ⚷278.

PLEADING.

For pleadings in particular actions o ings, see also the various specific to
For review of rulings relating to plea Appeal and Error.

I. FORM AND ALLEGATIO GENERAL.

⚷8(6) (U.S.C.C.A.) Specific denial way company had violated Safety

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POLICE POWER.

See Disorderly House.

POLICY.

See Insurance.

POST OFFICE.

See Appeal and Error, ⚷458; Courts, ⚷405; Criminal Law, ⚷371, 410, 491; Injunction.

II. MAILABLE MATTER, TRANSMISSION AND DELIVERY OF MAIL, AND MONEY ORDERS.

⚷22 (U.S.C.C.A.) In respect to mails, United States is not common carrier, but is pursuing high governmental duty, and it is at least questionable whether the government can be judicially compelled to assist in dissemination and distribution of publication which proclaims itself revolutionary.—Masses Pub. Co. v. Patten, 398.

III. OFFENSES AGAINST POSTAL LAWS.

⚷48(4) (U.S.C.C.A.) Indictment *held* sufficiently definite to disclose that it charged offense of violating Pen. Code, § 215, denouncing offense of using mails in connection with scheme to defraud.—Bowers v. United States, 89.

⚷48(4) (U.S.C.C.A.) An indictment for using the mails to defraud considered, and *held* sufficient to charge an offense.—Riddell v. United States, 143.

An indictment for using the mails for carrying out a scheme to defraud, which sets out the scheme in detail in the first count, may, in other counts, describe it by reference to the first.—Id.

⚷48(4) (U.S.C.C.A.) Indictment under Pen. Code, § 215, for use of mails to defraud, need not state the fraud with the technical details required in one for swindling.—Whitehead v. United States, 547.

Statements in indictment for using mails to defraud *held* to indicate wherein and how the scheme devised was fraudulent, and not to be void negations.—Id.

Indictment for use of mails to defraud, alleging contract holder to be misled into belief that it entitled him to a loan in six months, need not, in addition to negativing such effect, allege that he could not get the loan in a greater time, to escape the rule of de minimis.—Id.

Ordinarily, at least, indictment for use of mails to defraud is not subject to demurrer on the ground that the scheme is not apparently adapted to accomplish the crime intended; but its quality is for the jury.—Id.

Indictment for using mails to defraud, in describing fraudulent scheme, need not mention all the auxiliary devices, as an application which a contract recites is part of it.—Id.

There is no conflict between "tenor" and "in substance" in indictment for use of mails to defraud, introducing contract with the words, "a contract of tenor in substance as follows."—Id.

⚷49 (U.S.C.C.A.) In prosecution for violating Pen. Code, § 215, by using the mails in connection with scheme to defraud, where it was contended that defendant making representations as to his ownership of Mexican lands and their character, disposed of such lands when he did not have title, evidence *held* sufficient to sustain conviction.—Bowers v. United States, 89.

In prosecution for violating Pen. Code, § 215, by using the mails in connection with scheme to defraud, the government, in order to convict, must establish that defendant entered into scheme charged, that he intended to defraud, and that for purpose of executing his scheme he used the mails.—Id.

In prosecution for violating Pen. Code, § 215, by using the mails in connection with scheme to defraud, testimony as to events relating to scheme, but occurring more than three years before filing of indictment, is admissible where within that time mails had been used in furtherance of scheme.—Id.

Where defendant, having devised scheme to defraud, intentionally, and for purpose of carrying it out, wrote letter and mailed it in violation of Pen. Code, § 215, within three years prior to filing of indictment, it was not necessary, in order for such letter to be admissible, that it should show on its face that it was in furtherance of scheme to defraud.—Id.

⚷49 (U.S.C.C.A.) Admission, on prosecution for using the mails to promote a fraudulent scheme to solicit collections on percentage and to convert all the collections, of defendant's advertisement to sell an interest in a business paying a certain amount, tending to show representations which could be made good only by appropriating collections, is not error.—Clark v. United States, 408.

⚷49 (U.S.C.C.A.) Circumstances in evidence on prosecution for use of mails to defraud *held* sufficient to establish fraudulent character of transactions, intended to give appearance of those of building and loan association.—Whitehead v. United States, 547.

⚷50 (U.S.C.C.A.) In prosecution for using the mails in connection with scheme to defraud in disposition of Mexican lands, charge defining the word "owned" *held* sufficient.—Bowers v. United States, 89.

POWERS.

See Principal and Agent.

PRACTICE.

For practice in particular actions and proceedings, see the various specific topics.

PREFERENCES.

See Bankruptcy, ⚷160–185.

PRESCRIPTION.

See Limitation of Actions.

PRESUMPTIONS.

See Appeal and Error, ⚷927; Criminal Law, ⚷1144.

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PRINCIPAL AND AGENT

I. THE RELATION.

(A) Creation and Existence

⚷8 (U.S.C.C.A.) Contract between t
ers of a tract of land and a land com
which the latter undertook to subdivide
the land, construed, and *held* not to c
agency which rendered the owners li
fraudulent misrepresentations made to
ers.—Hart v. Adair, 247.

III. RIGHTS AND LIABILITIES THIRD PERSONS.

(E) Notice to Agent.

⚷177(1) (U.S.C.C.A.) Knowledge c
is imputed to principal, on presumptio
formation was communicated, but whe
circumstances, agent would naturally h
cealed his knowledge, law will not pr
was communicated.—Interstate Nat.
Kansas City, Mo., v. Yates Center N
of Yates Center, Kan., 486.

PRINCIPAL AND SURETY

See Bankruptcy, ⚷160; Guaranty;
nity; Subrogation.

III. DISCHARGE OF SURET

⚷121 (U.S.C.C.A.) In action on bo
by defendant to secure payment of ce
of deposit, *held*, that there was no
delay in presenting for payment a draft
company given by bank which issued cer
—Royal Indemnity Co. v. Beiseker, 538
Negligent delay in presenting for
draft given by bank, whose certificate
posit defendant guaranteed, does not
defendant from liability, where ban
have caused dishonor of draft, if sooner
ed, for defendant was in no way injure

IV. REMEDIES OF CREDITO

⚷161 (U.S.C.C.A.) Evidence *held* in
to sustain the defense of sureties on pr
notes.—Continental Gin Co. v. Stocker,

PROCESS.

See Attachment; Execution; Injunctio
damus.

PROFITS.

See Damages.

PROMISSORY NOTES.

See Bills and Notes.

PROPERTY.

See Fish; Shipping.

⚷2 (U.S.C.C.A.) News, where it has
mercial value, is property, and as such
to legal protection.—Associated Press
national News Service, 436.

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PUBLIC USE.

See Eminent Domain.

QUESTIONS OF LAW AND FACT.

See Trial, ⚷139.

RAILROADS.

See Courts, ⚷262; Master and Servant; Pleading, ⚷8.

II. RAILROAD COMPANIES.

⚷33(1) (U.S.C.C.A.) Acts Tenn. Dec. 4, 1851 (Laws 1851–52, c. 23), authorizing construction of railroad by Kentucky corporation, *held* to recognize it as a Kentucky corporation, and not to make it a corporation of both states. —Bryan v. Louisville & N. R. Co., 98.

IV. LOCATION OF ROAD, TERMINI, AND STATIONS.

⚷54 (U.S.C.C.A.) Where a railroad was constructed and operated for 40 years, *held* that its location for 20 miles could not be changed to location several miles distant without legislative authority.—Bryan v. Louisville & N. R. Co., 98.

Foreign railroad corporation complying with Const. Ala. 1901, § 232, *held* to have accepted the provisions of the Constitution, pursuant to section 246, so as to be entitled to relocate its railroad under Act Feb. 18, 1903 (Laws 1903, p. 131), as amended by Act Aug. 20, 1909 (Laws 1909, p. 62).—Id.

Kentucky railroad corporation, whose charter did not prohibit relocation of line of road, *held* authorized to relocate road in Alabama, providing laws of Alabama permitted it to do so.—Id.

Relocation of about 20 miles of railroad *held* not in violation of Act Ala. Feb. 18, 1903 (Laws 1903, p. 131), as amended by Act Aug. 20, 1909 (Laws 1909, p. 62), prohibiting change of termini or entire departure from original line.—Id.

Permission of Congress to relocation of line of road *held* not required, because United States granted part of the land to the state for the benefit of such road.—Id.

A change in the location of a railroad under legislative authority gives a member of the public no common-law right to damages, any injury sustained by him being damnum absque injuria. —Id.

V. RIGHT OF WAY AND OTHER INTERESTS IN LAND.

⚷65 (U.S.C.C.A.) Defendant, at most, *held* to have only license to operate railroad over plaintiffs' premises, and on revocation of license to be bound to remove railroad.—Plazuela Sugar Co. v. Pastoriza, 411.

⚷72(3) (U.S.C.C.A.) Relocation of railroad after maintaining it for 40 years *held* not breach of contract in consideration of which deeds to right of way were given.—Bryan v. Louisville & N. R. Co., 98.

Recital in deed from railroad company to land near the railroad that valuable improvements to be put on the land was a part of the consideration, *held* not a contract to forever maintain and operate its road in its then location.—Id.

X. OPERATION.

(B) Statutory, Municipal, and Official Regulations.

⚷229 (U.S.C.C.A.) The Safety Appliance Acts are mandatory in requiring that trains must not only be equipped to run, but must actually be run without requiring brakemen to use the hand brakes in the ordinary movement of the trains.—Great Northern Ry. Co. v. United States, 32.

(F) Accidents at Crossings.

⚷344(1) (U.S.C.C.A.) Complaint in action for death from collision, at railroad crossing, of engine with inclosed milk wagon, *held* to state a cause of action under the last clear chance doctrine.—Chicago, M. & St. P. Ry. Co. v. Clement, 181.

⚷350(33) (U.S.C.C.A.) Under evidence in action for death from collision, at railroad crossing, of engine with inclosed milk wagon, *held*, that whether company had last clear chance to avoid the accident was for the jury.—Chicago, M. & St. P. Ry. Co. v. Clement, 181.

(G) Injuries to Persons on or near Tracks.

⚷356(3) (U.S.C.C.A.) Where footpath and boardwalk across railroad bridge had been customarily used for years, *held*, that rights and obligations were the same as though footpath formed part of highway.—Robbins v. Pennsylvania Co., 597.

⚷370 (U.S.C.C.A.) Under Gen. Code Ohio, § 12549, *held*, that there was no obligation to ring bell or sound whistle in approaching bridge across which was a board walk customarily used by the public.—Robbins v. Pennsylvania Co., 597.

⚷381(4) (U.S.C.C.A.) Failure to ring bell or sound whistle, in approaching bridge used by the public, *held* not to relieve a pedestrian from necessity of taking ordinary precautions for his own safety.—Robbins v. Pennsylvania Co., 597.

⚷384 (U.S.C.C.A.) Negligence in maintaining narrow board walk across railroad bridge customarily used by public *held* to give no right of action for death, where the danger was manifest and well understood by decedent.—Robbins v. Pennsylvania Co., 597.

⚷401(9) (U.S.C.C.A.) In action for death of person struck by railroad engine on bridge on right of way, refusal of instructions on last clear chance *held* not erroneous, as the evidence at most authorized a finding of concurrent negligence.—Robbins v. Pennsylvania Co., 597.

RATIFICATION.

See Cancellation of Instruments, ⚷17, 43.

REAL PROPERTY.

See Property.

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RECEIVERS.

See Banks and Banking, ⚷77; Execution.

II. APPOINTMENT, QUALIFICATION, AND TENURE.

⚷35(1) (U.S.C.C.A.) On showing as to danger of irreparable injury, appointment of receiver for fraternal society without notice, subject to be vacated or modified after hearing, *held* not an abuse of discretion.—Supreme Council of Royal Arcanum v. Hobart, 11.

⚷35(3) (U.S.C.C.A.) Fraternal society, which appeared and obtained modifications of decree appointing receiver without notice, *held* in no position to claim that omission of notice prejudiced its rights.—Supreme Council of Royal Arcanum v. Hobart, 11.

IV. MANAGEMENT AND DISPOSITION OF PROPERTY.

(A) Administration in General.

⚷96 (U.S.C.C.A.) The general rule that a receiver should not employ counsel for either party has no application to a case in which a receiver is appointed in accordance with the prayer of the bill to collect assets.—McPherson v. United States, 331.

A United States attorney *held* not ineligible to appointment as counsel for a receiver appointed to collect assets in a suit by the United States.—Id.

RECORDS.

See Courts, ⚷259; Prostitution; Sales.

REFORMATION OF INSTRUMENTS.

See Cancellation of Instruments.

RELEASE.

See Accord and Satisfaction; Compromise and Settlement; Mortgages, ⚷310; Salvage, ⚷18.

I. REQUISITES AND VALIDITY.

⚷16 (U.S.C.C.A.) A release of personal injuries may be partially impeached, as where the injured party suffered injuries which at the time the release was executed were unknown to both.—Great Northern Ry. Co. v. Reid, 382.

Complainant, who was injured, and who suffered a hernia of which he did not know at the time of executing the release, *held* not estopped from impeaching release, though he refused to remove his coat to show trifling injury to shoulder.—Id.

II. CONSTRUCTION AND OPERATION.

⚷34 (U.S.C.C.A.) A release for injuries will not cover personal injuries not in contemplation of the parties and then unknown to each, despite the greatest generality in language.—Great Northern Ry. Co. v. Reid, 382.

III. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

⚷57(2) (U.S.C.C.A.) Where claim for personal injuries is released on settlement, the release

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SALES.

See Bankruptcy, ⚷260–269; Frauds, Statute of, ⚷72, 75–90; Waters and Water Courses, ⚷254.

IX. CONDITIONAL SALES.

⚷473(1) (U.S.C.C.A.) Purchase of machinery sold under conditional sale contract from buyer's assignee made by cashier of bank for the bank on account of its claim against buyer lacked essential elements of bona fide purchase for value.—Meyer v. Pacific Machinery Co., 178.

⚷474(2) (U.S.C.C.A.) By provision of Code 1913 W. Va. c. 74, § 3 (sec. 3831), to entitle seller of personalty delivered to purchaser to benefit of reservation of title till price is paid as against buyer's creditors, the contract must be recorded.—Citizens' Coal & Supply Co. v. Custard, 51.

⚷477(1) (U.S.C.C.A.) Letter and unsuccessful suit by seller of machinery under contract of conditional sale, in absence of buyer's reliance or action thereon, *held* not to waive seller's claim of title, or to estop it from asserting it.—Meyer v. Pacific Machinery Co., 178.

⚷479(7) (U.S.C.C.A.) Evidence in an action to recover the possession of sawmill property *held* to sustain a finding that it had been delivered under a conditional sale contract whereby title was to remain in the seller until paid for.—Meyer v. Pacific Machinery Co., 178.

SALMON.

See Fish.

SALVAGE.

I. RIGHT TO COMPENSATION.

⚷8 (U.S.C.C.A.) Services of members of crew of abandoned vessel, who reboarded her and brought her to a place of safety, *held* salvage services, justifying compensation, if they were capable of acquiring rights as salvors.—The Georgiana, 513.

⚷18 (U.S.C.C.A.) Members of crew, shipping on quarter lay plan, *held* incapable of becoming salvors while bound by their engagement, but capable after being discharged or released, expressly or by implication.—The Georgiana, 513.

II. AMOUNT AND APPORTIONMENT.

⚷29 (U.S.C.C.A.) Where members of crew of schooner, which had grounded and floated off, boarded her and at considerable danger brought her to place of safety, salvage award of $200 each will not be disturbed.—The Georgiana, 513.

⚷31 (U.S.C.C.A.) A salvage award of $500 to one of two tugs which towed a steamship from her slip some 300 feet from a burning elevator *held* not so inadequate as to warrant interference by an appellate court.—The Alice, 41.

III. LIEN AND RECOVERY.

⚷48 (U.S.C.C.A.) In suit for salvage compensation by members of crew, who returned to vessel after it had been deserted, evidence *held* to support finding of abandonment of vessel and voyage.—The Georgiana, 513.

SATISFACTION.

See Accord and Satisfaction; Compromise and Settlement; Payment; Release.

SEAMEN.

⚷3 (U.S.C.C.A.) A suit in admiralty by a seaman to recover for an injury alleged to have been caused by defective machinery or appliances on the ship is governed by the admiralty law.—Globe S. S. Co. v. Moss, 350.

⚷28 (U.S.C.C.A.) Members of crew, on fishing trip under the quarter lay plan, *held* to have a lien on the vessel and the catch, corresponding to that of seamen shipped for hire.—The Georgiana, 513.

⚷29(1) (U.S.C.C.A.) A shipowner, whose negligence contributed to the injury of a seaman, is liable therefor, notwithstanding the concurring negligence of another.—Globe S. S. Co. v. Moss, 350.

⚷29(2) (U.S.C.C.A.) A shipowner owes to his seamen a positive and nondelegable duty to see that the ship is seaworthy and her equipment in safe condition for use when she starts on a voyage.—Globe S. S. Co. v. Moss, 350.

A shipowner *held* liable for injury to a seaman caused by a defective feed pump.—Id.

⚷29(4) (U.S.C.C.A.) A seaman, injured in attempting to start a defective feed pump, *held* not to have assumed the risk, nor chargeable with contributory negligence.—Globe S. S. Co. v. Moss, 350.

⚷29(5) (U.S.C.C.A.) The fact and nature of an accident by which a seaman was injured *held* properly taken into consideration with all the other evidence in determining whether the shipowner was negligent in maintaining a pump in an unsafe condition.—Globe S. S. Co. v. Moss, 350.

SECONDARY EVIDENCE.

See Criminal Law, ⚷1169.

SERVANTS.

See Master and Servant.

SET-OFF AND COUNTERCLAIM.

See Bankruptcy, ⚷326.

SETTLEMENT.

See Accord and Satisfaction; Compromise and Settlement; Exceptions, Bill of; Payment; Release.

SHERMAN ACT.

See Monopolies.

SHIPPING.

See Admiralty; Collision; Salvage; Seamen.

IX. DEMURRAGE.

⚷173 (U.S.C.C.A.) No liability is destroyed by the cesser clause of a charter party, unless it is re-created in some one else by the lien clause.—Elvers v. W. R. Grace & Co., 153.

The cesser clause of a charter party construed, and *held* not to exempt the charterer

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from liability for demurrage incurred in loading.—Id.

⚷185 (U.S.C.C.A.) The reciprocal lien between ship and cargo arises only after the cargo is on board, and in the absence of contract therefor there is no maritime lien on the cargo for demurrage incurred by a charterer in the loading.—Elvers v. W. R. Grace & Co., 153.

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⚷12(2) (U.S.C.C.A.) Rule that stream remains boundary, notwithstanding accretion or erosion, but that, on a sudden and perceptible abandonment of the old channel, the boundary remains at the former line, *held* applicable to the boundary between states.—A. G. Wineman & Sons v. Reeves, 446.

Change in channel of the Mississippi river from a route around a bend to a route through the peninsula formed by the bend *held* such a sudden and perceptible change as did not affect the boundary between Mississippi and Arkansas.—Id.

After Mississippi river changed its channel to new route, *held*, that center line of old channel became fixed boundary between Arkansas and Mississippi, regardless of gradual and imperceptible accretions.—Id.

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IV. AMENDMENT, REVISION, AND CODIFICATION.

⚷131 (U.S.C.C.A.) In the absence of constitutional prohibition, an act may be amended by a mere addition thereto or by any change or alteration.—United States v. Lapp, 3.

VI. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

⚷225½ (U.S.C.C.A.) General legislation gives way to special legislation on the same subject, and generally must be so interpreted as to embrace only cases in which the special provisions are not applicable.—United States v. Lapp, 3.

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⚷14(1) (U.S.C.C.A.) Stipulation by defendant *held* not waiver of primary proofs showing acquirement of rights by plaintiffs' predecessors to use waters of stream.—Vineyard Land &

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IV. INFRINGEMENT AND UNFAIR COMPETITION.

(A) What Constitutes Infringement.

⚷59(5) (U.S.C.C.A.) Where plaintiff sold proprietary medicines as "Viava capsules," "Viava suppositories," etc., defendants' manufacture and sale of medicines as "Vimedia capsules," "Vimedia suppositories," etc., was not an imitation of plaintiff's names; such names not being subject to exclusive appropriation.—Viavi Co. v. Vimedia Co., 481.

Where plaintiff sold a proprietary medicine as "Viava royal," defendants' sale of a medical preparation as "Vimedia sovereign" was not a deceptive imitation.—Id.

(B) What Competition Unlawful.

⚷68 (U.S.C.C.A.) The Associated Press *held* entitled to an injunction to restrain unfair competition by a competitor in copying news items and using them as its own.—Associated Press v. International News Service, 436.

⚷70(1) (U.S.C.C.A.) Use by manufacturer and seller of proprietary medicines of books, etc., with contents, such as anatomical plates, etc., similar to those of another in the same business, *held* not unfair competition.—Viavi Co. v. Vimedia Co., 481.

Reproduction of another manufacturer's proprietary medicines, and sale under representations that they are the same article, *held* not unfair competition, if not sold as the goods of such other manufacturer.—Id.

⚷70(4) (U.S.C.C.A.) Use of same colors or same form of containers, cartons, or labels *held* not unfair competition, when such features are in common use in the trade.—Viavi Co. v. Vimedia Co., 481.

Defendant *held* not guilty of unfair competition, notwithstanding similarity in colors and form of containers, cartons, or vessels used in its proprietary medicine business to those of plaintiff.—Id.

⚷77 (U.S.C.C.A.) To solicit and offer inducements and persuasions to customers and agents of a competitor *held* not unfair competition, where no contract relations were threatened.—Viavi Co. v. Vimedia Co., 481.

V. TRADE-MARKS AND TRADE-NAMES ADJUDICATED.

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"Vimedia capsules."—Viavi Co. v. Vimedia Co., 481.
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"Vimedia suppositories."—Viavi Co. v. Vimedia Co., 481.

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(A) Questions of Law or of Fact in General.

⚷139(1) (U.S.C.C.A.) A case is properly taken from the jury and dismissed where the evidence, conceding all the inferences which the jury can justifiably draw from it, is insufficient to warrant a verdict.—Gill v. Waterhouse, 371.

VII. INSTRUCTIONS TO JURY.

(E) Requests or Prayers.

⚷260(8) (U.S.C.C.A.) In railway employé's action for injuries, instructions given *held* not to cover requested instruction as to right of operator of motor railway car to presume that automobile driver would not attempt to cross track.—Kansas City, C. & S. Ry. Co. v. Shoemaker, 413.

(G) Construction and Operation.

⚷296(2) (U.S.C.C.A.) In action for fraud, instruction authorizing finding of confidential relation, if plaintiff relied on defendants, *held* not fatally erroneous, in view of another instruction.—Southern Trust Co. v. Lucas, 478.

⚷296(10) (U.S.C.C.A.) Court's characterization of certain expert testimony as a joke, and statement that this was a mild term, *held* not prejudicial, in view of further instructions that the jury must judge the facts for themselves.—Southern Trust Co. v. Lucas, 478.

IX. VERDICT.

(A) General Verdict.

⚷323 (U.S.C.C.A.) Directed verdict, signed by juror designated by court, *held* sufficient without all the jurors signing it or selecting their own foreman to sign it.—Bryan v. Louisville & N. R. Co., 98.

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⚷36 (U.S.C.C.A.) Civil service regulations *held* not to have the force of law, and the courts cannot enforce them or review the removal of an employé.—United States v. Lapp, 3.

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⚷3 (U.S.C.C.A.) Under Act Oct. 22, 1913, c. 32, authorizing appointment and removal of deputy marshals without regard to the Civil Service Act Jan. 16, 1883, c. 27, the marshal

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held authorized to exercise the power
tion and appointment in his individu
tion.—United States v. Lapp, 3.

Act Oct. 22, 1913, c. 32, *held* in co
Act Aug. 24, 1912, c. 389, § 6, and to
it so far as removal of deputy m
concerned.—Id.

It was within the power of Congr
thorize United States marshals to r
appointment of deputy marshals at th
tion, as was done by Act Oct. 22, 1
—Id.

That Act Oct. 22, 1913, c. 32, as
pointment and removal of deputy mar
a rider to an appropriation bill, can
its construction.—Id.

Under Act Oct. 22, 1913, c. 32,
marshal could be removed by the mar
out notice or a hearing.—Id.

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⚷144 (U.S.C.C.A.) There is no ow
water flowing in a natural stream b
diverted into a ditch, or at least rest
such diversion by a dam or otherwis
Gold Mining Co. v. Oro Electric Corp.

That a complainant, by diverting w
a stream, deprived defendant of wa
it had a prior right to appropriate, *h*
fense to a suit to enjoin defendant f
ing the ditch and taking water there

That the owner of a ditch having
ment over defendant's land carried m
therein than it was entitled to *held* t
fendant no right to tap the ditch and
the excess for its own use.—Id.

IX. PUBLIC WATER SUP

(B) Irrigation and Other Agric Purposes.

⚷240 (U.S.C.C.A.) Appropriation
from public stream, under Carey Ac
initiated by notice on actual diver
stream.—Vineyard Land & Stock Co
Falls Salmon River Land & Water C

In appropriation of water from stre
tice, notice would indicate amount o

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⚷249 (U.S.C.C.A.) After initiating appropriation, appropriator must use due diligence in applying water to beneficial use or he will be deemed to have abandoned rights.—Vineyard Land & Stock Co. v. Twin Falls Salmon River Land & Water Co., 305.

Whether appropriator of water from public stream has used due diligence to utilize water for beneficial use must be determined upon facts of particular case.—Id.

Want of diligence in constructing high line ditch and application of water to beneficial use, *held* to deprive defendant of its initiatory rights in so far as affecting plaintiffs' appropriations.—Id.

Appropriator can claim no more than is necessary for purpose of appropriation, and when he has that he cannot prevent others from using surplus.—Id.

⚷254 (U.S.C.C.A.) In suit between appropriators of water of stream, *held* that court properly concluded that 12,500 acre-feet was sufficient to answer needs of defendant.—Vineyard Land & Stock Co. v. Twin Falls Salmon River Land & Water Co., 305.

In suit to determine conflicting rights to waters of stream, 3 acre-feet per acre for hay and grain land, and 1½ acre-feet for pasture land, *held* reasonable allowance to defendant, whose land was only slightly above water in streams.—Id.

⚷254 (U.S.C.C.A.) Defendants could not complain that duty of water was not measured by old flooding system, they not being entitled to more water than they were able to apply to reasonable and economical use.—Vineyard Land & Stock Co. v. Twin Falls Oakley Land & Water Co., 326.

In suit to determine conflicting rights to waters of public stream, allowance to defendant of three acre-feet per acre for hay and grain lands, and two acre-feet for grazing lands, *held* sufficient.—Id.

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III. CONTRACTS TO DEVISE OR BEQUEATH.

⚷58(1) (U.S.C.C.A.) A contract between plaintiff and deceased whereby he was to devise to her bulk of his estate, *held* not illegal as in restraint of marriage.—Quirk v. Bank of Commerce & Trust Co., 130.

⚷68 (U.S.C.C.A.) Under Shannon's Code Tenn. §§ 4437, 4438, 4439, plaintiff's declaration, setting up an oral contract to devise land, *held* to state a good cause of action on quasi contract arising on account of plaintiff's performance and nonenforceability of agreement under statute of frauds.—Quirk v. Bank of Commerce & Trust Co., 130.

Limitations against plaintiff's action on quantum meruit on account of deceased's breach of his oral agreement to devise land to plaintiff in consideration of services begins to run only at date of death.—Id.

IV. REQUISITES AND VALIDITY.

(F) Mistake, Undue Influence, and Fraud.

⚷166(4) (U.S.C.C.A.) A trustee of testamentary trusts, having no pecuniary interest in the estate, except the right to receive reasonable compensation for his services, *held* not the "principal beneficiary" in the will, within the meaning of Gen. St. Kan. 1909, § 9787.—Bauer v. Myers, 252.

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(D) Inconsistent Statements by Witness.

⚷397 (U.S.C.C.A.) Testimony of inconsistent statement introduced to contradict a witness could only be considered for that purpose, and was in no sense substantive evidence.—Barrett v. Virginian Ry. Co., 23.

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